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SUPREME COURT U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED OCTOBER 2, 1959
CERTIORARI GRANTED DECEMBER 14, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 451

PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 50027

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Plaintiff,

v.

THE UNITED STATES, Defendant.

PETITION—Filed February 7, 1951

To the Honorable Judges of the Court of Claims:

The petition of The Pennsylvania Railroad Company, a corporation, respectfully shows:

I.

Plaintiff is a corporation engaged in interstate commerce as a common carrier of passengers and freight for hire, duly organized and existing under the laws of the Commonwealth of Pennsylvania.

[fol. 2]

II.

During the months of December, 1941, and January and September, 1942, plaintiff, at the request of the proper officers of the United States Government, transported under Government transportation requests between points within the United States, freight for the account of the United States Government.

III.

The freight charges in the amount of Twenty Thousand Two Hundred Five Dollars and Two Cents ($20,205.02) legally applicable to such transportation, based upon published tariffs lawfully on file with the Interstate Commerce Commission, were paid by the United States Government to the plaintiff, which, as the delivering carrier of all of

the said freight transportation, was and is the party entitled to receive payment of the charges for such transportation.

IV.

Notwithstanding the foregoing, the General Accounting Office, in March and June 1946 and January, June, July and November 1947, reduced the amount of the payment of such charges by deducting a portion thereof from certain other of plaintiff's bills then in the course of payment covering charges for other freight transportation acknowledged to be due and owing to the plaintiff by the United States Government.

V.

There is attached hereto and made a part hereof a statement marked "Exhibit A" showing in connection with such deducted freight charges the bill number, contract number, [fol. 3] point of origin, point of destination, waybill number, date, commodity, correct basis for freight charges, freight charges as paid, balance due, bill number from which deduction was made, date of deduction, and Government file number.

VI.

The freight charges represented by such deductions, totalling Seven Thousand Two Hundred Thirty Seven Dollars and Eighty-Seven Cents ($7,237.87), were and are legally due on said transportation, in accordance with published tariffs lawfully on file with the Interstate Commerce Commission, and plaintiff, therefore, is entitled to recover the total amount of Seven Thousand Two Hundred Thirty Seven Dollars and Eighty-Seven Cents ($7,237.87).

VII.

Plaintiff has made no assignment or transfer of its claim aforesaid, or any part thereof or interest therein, and is entitled to the full amount of said claim after making proper allowances for all just credits and set-offs.

Wherefore, plaintiff prays judgment in its favor against the United States in the amount of Seven Thousand Two Hundred Thirty Seven Dollars and Eighty-Seven Cents ($7,237.87).

The Pennsylvania Railroad Company, By P. D. Fox, Treasurer.

[fol. 4] *Duly sworn to by P. D. Fox, jurat omitted in printing.*

[fols. 5-6]

Exhibit "A" to Petition

(See Opposite) ☞

Ex. 4

THE PENNSYLVANIA RAILROAD COMPANY

DIFFERENCE BETWEEN DOMESTIC AND EXPORT RATES ON COMMERCIAL PREPAID SHIPMENTS WHICH WERE FRUSTRATED

Bill No.	Contract No.	Origin	Destination	W/B No.	Date	Commodity	Correct Basis Weight	Correct Basis Rate	Correct Basis Charges	Paid Weight	Paid Rate	Paid Charges	Balance Due Carriers
7-27-212060	DATPS 12183	Pencoyd, Pa.	New York, N. Y.	997802	9- 5-42	Steel Ingots	121380	4.08 G.T.	221.05	121380	2.45 G.T.	132.76	88.29
7-27-9600B	DATPS 4427	Butler, Pa.	New York, N. Y.	26263	4-29-42	Sheet Iron	105900	38	402.42	105900	24	254.16	148.26
7-27-9600B	DATPS 4427	Butler, Pa.	New York, N. Y.	26264	4-29-42	Sheet Iron	105480	38	400.82	105480	24	253.15	147.67
7-27-9600E	DATPS 13084	Munhall, Pa.	New York, N. Y.	901612	12-3-42	Tin Plate	102641	38	390.04	102641	24	246.34	143.70
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218616	9-19-42	Billets	127700	4.26 G.T.	242.84	127700	2.68 G.T.	152.78	90.06
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218614	9-19-42	Billets	127500	4.26 G.T.	242.46	127500	2.68 G.T.	152.54	89.92
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218693	9-21-42	Billets	118500	4.26 G.T.	225.35	118500	2.68 G.T.	141.77	83.58
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218698	9-21-42	Billets	152800	4.26 G.T.	290.57	152800	2.68 G.T.	182.81	107.76
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218694	9-21-42	Billets	114800	4.26 G.T.	219.31	114800	2.68 G.T.	137.35	81.96
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218687	9-21-42	Billets	122300	4.26 G.T.	232.57	122300	2.68 G.T.	146.32	86.25
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218693	9-21-42	Billets	105400	4.26 G.T.	200.43	105400	2.68 G.T.	126.10	74.33
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218685	9-21-42	Billets	116800	4.26 G.T.	222.11	116800	2.68 G.T.	139.74	82.37
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218615	9-19-42	Billets	127600	4.26 G.T.	242.65	127600	2.68 G.T.	152.66	89.99
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218697	9-21-42	Billets	155200	4.26 G.T.	295.14	155200	2.68 G.T.	185.68	109.46
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218691	9-21-42	Billets	119300	4.26 G.T.	226.87	119300	2.68 G.T.	142.73	84.14
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218686	9-21-42	Billets	151100	4.26 G.T.	287.34	151100	2.68 G.T.	180.78	106.56
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218620	9-19-42	Billets	124000	4.26 G.T.	235.80	124000	2.68 G.T.	148.35	87.45
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	219618	9-19-42	Billets	129900	4.26 G.T.	247.02	129900	2.68 G.T.	155.41	91.61
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218695	9-21-42	Billets	119900	4.26 G.T.	228.01	119900	2.68 G.T.	143.45	84.56
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218699	9-21-42	Billets	122900	4.26 G.T.	233.71	122900	2.68 G.T.	147.04	86.67
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218689	9-21-42	Billets	122400	4.26 G.T.	232.76	122400	2.68 G.T.	146.44	86.32
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218690	9-21-42	Billets	122400	4.26 G.T.	232.76	122400	2.68 G.T.	146.44	86.32
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218688	9-21-42	Billets	123300	4.26 G.T.	234.47	123300	2.68 G.T.	147.52	86.95
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218617	9-19-42	Billets	130200	4.26 G.T.	247.60	130200	2.68 G.T.	155.77	91.83
7-27-212058	DATPS 12037	Sparrows Point, Md.	New York, N. Y.	218619	9-19-42	Billets	128600	4.26 G.T.	244.55	128600	2.68 G.T.	153.86	90.69
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6254	12-15-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6255	12-15-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6325	12-16-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6472	12-18-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6473	12-18-41	Tin Plate	96600	36	347.76	96600	23	222.18	125.58
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6662	12-22-41	Tin Plate	105000	36	378.00	105000	23	241.50	136.50
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	6663	12-22-41	Tin Plate	105000	36	378.00	105000	23	241.50	136.50
7-27-10090A	DATPS 986	Follansbee, W. Va.	New York, N. Y.	7005	12-29-41	Tin Plate	81900	36	294.84	81900	23	188.37	106.47
7-27-212056	DATPS 1505	Follansbee, W. Va.	New York, N. Y.	7249	1- 2-42	Tin Plate	102400	36	368.64	102400	23	235.52	133.12
7-27-212056	DATPS 1505	Follansbee, W. Va.	New York, N. Y.	7573	1- 8-42	Tin Plate	106960	36	385.06	106960	23	246.01	139.05
							Total Sheet No. 1		10021.99			6335.75	3686.24

EXHIBIT
Sheet 1

ILROAD COMPANY

TS WHICH WERE FRUSTRATED AT THE PORTS AND REFORWARDED TO OTHER POINTS

Paid Rate	Paid Charges	Balance Due Carriers	Deducted From Bill No.	Date of Deduction	Government File
2.45 G.T.	132.76	88.29	7-27-194141	7- 3-47	T-GAO-2526A-LOV-966673-15/44-GFA-7.27/D/11901
24	254.16	148.26	7-27-187113	1-20-47	T-GAO-2526A-ARG-1757769-3/44-GFA-7.27/9600B
24	253.15	147.67	7-27-187113	1-20-47	T-GAO-2526A-ARG-1757769-3/44-GFA-7.27/9600B
24	246.34	143.70	7-27-183856A	1-20-47	T-GAO-2526A-ARG-1758908-3/44-GFA-7.27/9600E
2.68 G.T.	152.78	90.06	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	152.54	89.92	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	141.77	83.58	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	182.81	107.76	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	137.35	81.96	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	146.32	86.25	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	126.10	74.33	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	139.74	82.37	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	152.66	89.99	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	185.68	109.46	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	142.73	84.14	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	180.78	106.56	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	148.35	87.45	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	155.41	91.61	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	143.45	84.56	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	147.04	86.67	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	146.44	86.32	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	146.44	86.32	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	147.52	86.95	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	155.77	91.83	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
2.68 G.T.	153.86	90.69	7-27-171059	6-26-46	T-GAO-2526A-BHM-745770-10/43-GFA
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	222.18	125.58	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	241.50	136.50	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	241.50	136.50	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	188.37	106.47	7-27-194690	6-27-47	T-GAO-2526A-BLS-1349076-1/45-GFA-7/27/A10090
23	235.52	133.12	8-219669	11-21-47	T-GAO-2526A-MIT-1349074-1/45-GFA-7.27/B10090
23	246.01	139.05	8-219669	11-21-47	T-GAO-2526A-MIT-1349074-1/45-GFA-7.27/B10090
	6335.75	3686.24			

THE PENNSYLVANIA RAILROAD COMPANY

DIFFERENCE BETWEEN DOMESTIC AND EXPORT RATES ON COMMERCIAL PREPAID SHIPMENTS WHICH WERE FRUSTRA

Bill No.	Contract No.	Origin	Destination	W/B No.	Date	Commodity	Correct Basis Weight	Correct Basis Rate	Correct Basis Charges	Paid Weight	Paid Rate	Paid Charges	Balance Carrier
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386688	9-21-42	Sheet Steel	59900	43	257.57	59900	28	167.72	89.85
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386538	9-16-42	Sheet Steel	60792	43	260.71	60792	28	170.22	90.49
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386718	9-22-42	Sheet Steel	60473	43	260.03	60473	28	169.32	90.71
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386720	9-22-42	Sheet Steel	60310	43	259.33	60310	28	168.87	90.46
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386504	9-15-42	Sheet Steel	60415	43	259.78	60415	28	169.16	90.62
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386768	9-24-42	Sheet Steel	59116	43	254.20	59116	28	165.52	88.68
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386769	9-24-42	Sheet Steel	58760	43	252.67	58760	28	164.53	88.14
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386767	9-24-42	Sheet Steel	59724	43	256.81	59724	28	167.23	89.58
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386719	9-22-42	Sheet Steel	60090	43	258.39	60090	28	168.25	90.14
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386641	9-19-42	Sheet Steel	59099	43	254.13	59099	28	165.48	88.65
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386685	9-21-42	Sheet Steel	60320	43	259.38	60320	28	168.90	90.48
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386575	9-17-42	Sheet Steel	48177	43	207.16	48177	28	134.90	72.26
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386455	9-14-42	Sheet Steel	60317	43	259.36	60377	28	168.89	90.47
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386939	9-19-42	Sheet Steel	60609	43	260.62	60609	28	169.71	90.91
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386577	9-17-42	Sheet Steel	60663	43	260.85	60663	28	169.86	90.99
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386607	9-18-42	Sheet Steel	58811	43	252.89	58811	28	164.67	88.22
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386457	9-14-42	Sheet Steel	60274	43	259.18	60274	28	168.77	90.41
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386539	9-16-42	Sheet Steel	60765	43	261.29	60765	28	170.14	91.15
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386458	9-14-42	Sheet Steel	60024	43	258.10	60024	28	168.07	90.03
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386609	9-18-42	Sheet Steel	59380	43	255.33	59380	28	166.26	89.07
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386456	9-14-42	Sheet Steel	59677	43	256.61	59677	28	167.08	89.53
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386537	9-16-42	Sheet Steel	60763	43	261.28	60763	28	170.14	91.14
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386605	9-18-42	Sheet Steel	44458	43	190.98	44458	28	124.48	66.50
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386505	9-15-42	Sheet Steel	60472	43	260.03	60472	28	169.32	90.71
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386606	9-18-42	Sheet Steel	59430	43	255.55	59430	28	166.40	89.15
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386378	9-11-42	Sheet Steel	57000	43	245.10	57000	28	159.60	85.50
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386374	9-11-42	Sheet Steel	59015	43	253.77	59015	28	165.24	88.53
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386404	9-12-42	Sheet Steel	59573	43	256.16	59573	28	166.80	89.36
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386403	9-12-42	Sheet Steel	59515	43	255.91	59515	28	166.64	89.27
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386401	9-12-42	Sheet Steel	59094	43	254.10	59094	28	165.46	88.64
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386540	9-16-42	Sheet Steel	60852	43	261.65	60852	28	170.39	91.26
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386686	9-21-42	Sheet Steel	59284	43	254.92	59284	28	166.00	88.92
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386687	9-21-42	Sheet Steel	60586	43	260.52	60586	28	169.64	90.88
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386740	9-23-42	Sheet Steel	58613	43	252.04	58613	28	164.12	87.92
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386640	9-19-42	Sheet Steel	82970	43	356.77	82970	28	232.32	124.45
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386741	9-23-42	Sheet Steel	58614	43	252.04	58614	28	164.12	87.92
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386376	9-11-42	Sheet Steel	53380	43	229.53	53380	28	149.46	80.07
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386377	9-11-42	Sheet Steel	59488	43	255.80	59488	28	166.57	89.23
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386375	9-11-42	Sheet Steel	53455	43	229.86	53455	28	149.67	80.19
7-27-212059	DATPS 13172	Canton, Ohio	New York, N. Y.	386337	9-10-42	Sheet Steel	54101	43	232.63	54101	28	151.48	81.15
							Total Sheet No. 2		10183.03			6631.40	3551.63

• Only $3549.63 deducted from Bill No. 7-27-152810 account $2.00 error in deduction.

RECAPITULATION

Sheet No. 1	10021.99		6335.75	3686.24
Sheet No. 2	10183.03		6631.40	3551.63
Total	20205.02		12967.15	7237.87

EXHIBIT A
Sheet 2

OAD COMPANY

WHICH WERE FRUSTRATED AT THE PORTS AND REFORWARDED TO OTHER POINTS

Paid Rate	Charges	Balance Due Carriers	Deducted From Bill No.	Date of Deduction	Government File
28	167.72	89.85	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.22	90.49	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.32	90.71	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.87	90.46	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.16	90.62	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.52	88.68	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.53	88.14	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	167.23	89.58	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.25	90.14	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.48	88.65	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.90	90.48	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	134.90	72.26	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.89	90.47	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.71	90.91	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.86	90.99	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.67	88.22	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.77	90.41	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.14	91.15	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	168.07	90.03	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.26	89.07	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	167.08	89.53	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.14	91.14	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	124.48	66.50	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.32	90.71	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.40	89.15	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	159.60	85.50	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.24	88.53	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.80	89.36	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.64	89.27	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	165.46	88.64	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	170.39	91.26	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.00	88.92	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	169.64	90.88	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.12	87.92	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	232.32	124.45	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	164.12	87.92	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	149.46	80.07	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	166.57	89.23	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	149.67	80.19	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
28	151.48	81.15	7-27-152810	March 1946	General Services Adm., Federal Supply Service, File 43-1241, Dated February 15, 1950
	6631.40	3551.63			

	6335.75	3686.24
	6631.40	3551.63
	12967.15	7237.87

[fol. 9]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

GENERAL TRAVERSE—Filed March 9, 1951

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Newell A. Clapp, Acting Assistant Attorney General.

GVP
JBM
Actg.

[fol. 10] [File endorsement omitted]

[fol. 11]

IN THE UNITED STATES COURT OF CLAIMS

No. 50027

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,

v.

THE UNITED STATES.

REPORT OF COMMISSIONER—Filed June 8, 1956

To the honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Plaintiff is, and, at all times herein involved, was a corporation duly organized and existing under the laws of

the Commonwealth of Pennsylvania, engaged in interstate commerce as a common carrier by railroad.

2. During the period from December 15, 1941, to and including December 3, 1942, plaintiff transported the 75 carloads of iron and steel products involved in this action over its railroad lines from various steel mills to New York, New York, for exportation to Great Britain. The shipments moved on commercial bills of lading and the shipping charges were prepaid by the consignor on the basis of a tariff providing for an export rate from the point of origin to New York City. The bills of lading relating to the 75 carloads listed the following consignors and consignees:

40 shipments consigned by the Superior Sheet Steel Company at Canton, Ohio to the British Ministry of War Transport, Iron and Steel Division (hereafter designated B. M. W. T.) c/o War Forwarding Corporation, New York, New York;

21 shipments consigned by the Bethlehem Steel Company to the B. M. W. T., c/o War Forwarding Corporation, New York, New York;

10 shipments consigned by the Follansbee Steel Corp., Follansbee, West Virginia, to B. M. W. T., New York, New York;

[fol. 12] 2 shipments consigned by the American Rolling Mill Co., Butler, Pennsylvania to B. M. W. T., account U. S. Treasury Procurement Division, Iron and Steel Division, New York, New York:

1 shipment consigned by the United States Steel Export Company, Irvin, Pennsylvania to B. M. W. T., c/o War Forwarding Corporation, New York, New York; and

1 shipment consigned by the Carnegie, Illinois Steel Corp., Pencoyd, Pennsylvania to B. M. W. T., c/o War Forwarding Corporation, New York, New York.

All the shipments were marked for export. None of the bills mentioned the United States except the two from the Amer-

ican Rolling Mill Co. which were consigned to the "British Ministry of War Transport Account U. S. Treasury Procurement Division, Iron and Steel Division, New York, New York".

3. All of the iron and steel products involved in this action were manufactured by the consignors, pursuant to contracts with the Procurement Division of the United States Treasury Department. It was all intended for export to Great Britain as lend-lease material and was consigned for delivery to B. M. W. T. at New York City, an agency of the British Government, for shipment after the goods left the possession of the rail carrier. The procurement contracts provided for prepayment of the inland freight on the goods to New York as part of the consideration under the contracts. These contracts also contained the following provision:

> In the event shipment is made to other ports the unit price will be adjusted by the difference between the inland export freight rates to New York, N. Y., Philadelphia, Pa. or Baltimore, Md. and the applicable inland export freight rate to the other ports.

4. At a pre-trial conference it was agreed by plaintiff and defendant that title to the property, transported by the plaintiff railroad, passed to the defendant at the point of origin of the shipments, i.e. when the cargoes were delivered by the manufacturer to the railroad.

5. The War Forwarding Corporation, later dissolved, was a private corporation formed and organized under the laws of the State of New York. This corporation acted as a [fol. 13] freight forwarder for the British Ministry of War Transport (B. M. W. T.). At the request of the B. M. W. T. the War Forwarding Corporation would place shipping orders for iron and steel products with the Procurement Division of the United States Treasury Department. The shipping orders would show when and where the B. M. W. T. wished the goods to be shipped. The rail shipments were not ordered into New York until arrangements had been made for a convoy of ships to transport them to Great Britain.

The usual function of a freight forwarder in handling goods for export is to act as the agent of the consignee at the port. The War Forwarding Corporation was performing these services for the B. M. W. T. Each of the shipments was unloaded from the cars and placed in ground storage at Greenville Piers or Manhattan Piers, at which points the railroads maintained storage yards with lighterage facilities.

6. Because of (1) the activity of enemy submarines off the Atlantic Coast of the United States, or (2) other conditions brought about through the prosecution of the war, the movement of traffic was altered in the manner which would best utilize available ship tonnage or insure delivery by a safer route.

7. When, because of the conditions referred to in finding 6, it became necessary to forward shipments to other places for exportation, the B. M. W. T. gave the necessary orders to the War Forwarding Corporation which in turn relayed such orders to the railroad.

8. Twenty-one of the shipments were subsequently exported by rail to the Metal Reserve Company, c/o Steel Company of Canada, Hamilton, Ontario. The United States Government did not pay the freight charges on this movement. All of the freight charges were paid by the Steel Company of Canada. The remaining 54 shipments were transported by rail to other ports in the United States and were exported from such ports.

9. When it developed that a shipment could not be exported through the port of New York due to wartime conditions, the B. M. W. T. made the determination as to where the particular shipment should be forwarded to best serve [fol. 14] the interest of the British Government in fulfilling the reqirements needed to complete the British part of lend-lease.

10. One of the functions of the Office of Defense Transportation of the United States was to coordinate and direct the movement of traffic so as to prevent congestion. The Office of Defense Transportation advised the B. M. W. T.

through the War Forwarding Corporation when a particular port area was congested. The B. M. W. T. was guided by the information received from the Office of Defense Transportation in amending prior instructions relating to shipments into congested areas.

11. The Office of Defense Transportation controlled the movement of traffic by means of permits. Separate permits were issued for the shipments to and from New York. Permits were not issued until it was determined that a shipment could be handled and that shipping space was available at any particular port. Some of the shipments involved in this suit moved under such permits. Commercial bill of lading dated September 21, 1942, covering a carload of sheet steel from Canton, Ohio, shipped in car No. Wabash 83737, shows that permit No. QMR #PB 380127 was issued to cover the movement to New York. Government bill of lading No. DA-TPS 264244 covering a shipment of four carloads of sheet steel, including the above-mentioned inbound carload, from New York to San Francisco, California, shows that ODT Block Permit No. QMR. No. PI-430211 was issued to cover this movement.

12. After the shipments had been forwarded from New York to other points, plaintiff submitted supplemental bills to the Procurement Division, United States Treasury. These bills claimed additional transportation charges representing the difference between the export and domestic rates applicable on the shipments into New York. The bills were paid without question by the Treasury Department under authority of Section 322 of the Transportation Act of 1940.

13. No determination was made by the Procurement Division as to the correctness of the freight rates claimed in the supplemental bills, since the audit of the transportation charges was to be made by the General Accounting Office at a later date pursuant to the provisions of Section 322 of the Transportation Act of 1940.

[fol. 15] Subsequently, on the basis of an audit by the General Accounting Office, the amount of these additional charges was deducted from other bills (not in dispute) on the theory that the higher rate was not applicable or was

unreasonable. The present action was brought to recover the amount of these deductions.

14. The bills submitted by plaintiff for the difference in the domestic and the export rate on the shipments into New York were stamped and initialed with a certification as follows: "Certified correct and reasonable, War Forwarding Corporation, Iron and Steel Division, by R." On the back thereof was the following, apparently placed by a stamp:

> I certify that the service shown on this bill has been performed, that it was necessary and that the charge is proper.
>
> British Ministry of War Transport Per War Forwarding Corporation, Agents.

These statements were placed on the bills as a certification that the services had been performed and that the services were necessary. Any attempted approval of the correctness of the charges was obviously unauthorized since such function had been reserved to the General Accounting Office. There is no dispute on this point.

15. In procuring and financing material for lend-lease to Great Britain, money was allocated to the Procurement Division of the United States Treasury Department to obtain items which had no direct relationship to military or agricultural equipment. The iron and steel products involved in this suit came within that category. Contracts were let for the materials requisitioned and the funds allotted were used to pay for them. Where the procurement contracts required the manufacturer to prepay freight bills on the shipment of the materials to the port as part of the contract price, as was provided in the contracts involved in this suit, the Treasury Procurement Division would require the carrier to secure payment of such supplemental bills from the consignor.

16. The Finance Division, Treasury Procurement Office, had authority to pay bills in connection with lend-lease materials for Great Britain and did pay the transportation charges for such bills. When such bills were submitted there

[fol. 16] was provision for an examination of the bills in order to determine whether the goods were in fact for lend-lease purposes and whether the United States was the consignor and thus obligated to pay the shipping charges. When this fact was established, such bills were paid. The bills submitted and paid in the present suit for the supplemental charges, representing the difference between the domestic and export rate on the iron and steel products from the various places of manufacture to the New York port, contained no reference to a Government contract. It was the usual practice to refer the carriers involved in such bills to the consignors who were obligated to pay these shipping costs.

17. The cost of procuring lend-lease materials for Great Britain and the costs of handling such materials were charged in accounts to lend-lease allotments. Such lend-lease accounts with Great Britain have now been settled.

18. If the shipments had been exported from New York as originally consigned, the proper transportation charges for them from the points of origin to the New York port would have been on the basis of the export rates. The conditions in the export tariff were complied with up to the time of the diversion.

19. The practice of the plaintiff with respect to charges such as those here in dispute was to reserve all rights against the original shipper until the amount of the charges had been received from the United States. In some cases the plaintiff brought suit against the original shipper in order to protect the plaintiff from the expiration of the statute of limitations. Upon the payment of the charges by the United States, the suit against the original shipper was withdrawn.

20. The shipping charges as prepaid by the consignors included all necessary costs until the goods were to be turned over to the ocean carriers. At the time of the diversion they were in storage in possession of the carrier at Manhattan and Greenville piers at the New York port. If these goods had been exported as originally planned it would have been necessary for plaintiff to have performed

additional services in the movement of the goods to ship-side by lighterage or otherwise at no additional cost to the consignor or consignee above that represented by the prepaid bills except for applicable storage charges.

[fol. 17] The prepaid commercial bills of lading upon which these cargoes moved to the New York port contained expressions of release by the consignor in terms as follows or comparable thereto:

> Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

21. At the time the shipments here in question moved from the point of manufacture to the New York port, plaintiff was a party to Tariff 1895-C designated "Local, joint, proportional, coastwise, export and intercoastal freight tariff on iron and steel articles" applicable over routes in question. It allowed an export rate but upon a condition set out in Item 20 that such rates would apply only on shipments exported direct from railroad terminals to foreign countries. This tariff, which broadened the application of the rates, was amended effective December 28, 1942. It has been commonly referred to as the "frustrated freight tariff" since it permitted application of the export rates "on freight in carloads originating at points in continental United States or Dominion of Canada when consigned to a port in the United States for export which, after arrival at such port, due to the war emergency, is reshipped to another port for export or is reshipped to a point in the interior and there domesticated or again reshipped to a port for export." Other pertinent provisions of the tariff were:

> (d) Shipments consigned to a port for export which, after arrival at such port, are later shipped therefrom as new shipments to another port via a route via which

the through rate from point of origin to port through which the shipments actually are exported does apply:

Apply the export rate to the port to which originally consigned plus the export rate from such port to the port through which the shipment actually is exported, except that where shipments are stored at the port to which originally consigned under transit arrangements which authorize the protection of a through rate, such through rate will apply from the original point of shipment to the port through which the shipment actually is exported.

[fol. 18] (c) Shipments consigned to a port for export which, after arrival at such port, are later shipped therefrom as new shipments to the point of origin or any other point in the interior and there domesticated:

Apply the export rate to the port to which originally consigned plus the domestic rate from such port to the point in the interior, but not less than the domestic rate from the point of origin to the point in the interior at which the shipment is domesticated.

22. Prior to December 28, 1942, the export rate was uniformly held to be inapplicable to shipments of iron and steel articles which were not in fact exported from the originally intended port of exportation. All of the shipments involved in this action were made prior to December 28, 1942.

On December 28, 1942 Tariff F-1 (the so-called "frustrated freight tariff") became effective and created an exception permitting the application of the export tariff to shipments which were in fact exported but not from the originally intended port of exportation. By its own terms this tariff applied only to shipments taking place subsequent to its effective date.

23. The Treasury Department of the United States paid to plaintiff a total of $7,237.87 as supplemental freight charges on the iron and steel articles to the New York port, representing the difference between the amount prepaid on the basis of the export rate and the amount that would be due on the basis of the domestic rate. Subsequently, this

amount was deducted by the Finance Division of the Office of Treasury Procurement and by the General Accounting Office from moneys otherwise due plaintiff on other shipments. If the charges on the shipments involved in this suit from the points of manufacture to the New York port are properly computed on the basis of the export rate, plaintiff has been paid in full for such charges. If it is proper to compute such charges on the basis of the domestic rate, plaintiff is entitled to recover a total of $7,237.87.

Respectfully submitted.

Paul H. McMurray, Commissioner.

[fol. 19]

IN THE UNITED STATES COURT OF CLAIMS

ARGUMENT AND SUBMISSION OF CASE—January 16, 1957
(omitted in printing)

[fol. 21]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER OF THE COURT SUSPENDING PROCEEDINGS PENDING DETERMINATION BY INTERSTATE COMMERCE COMMISSION—April 3, 1957

This case comes before the court on the merits pursuant to the report of the commissioner and the briefs and argument of counsel. Upon consideration thereof,

It Is Ordered this third day of April, 1957, that further proceedings be and the same are suspended pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments involved in this suit, the court having found that this case warrants such a procedure. *United States* v. *The Western Pacific Railroad Co., et al.*, No. 18, October 1956 Term, Supreme Court, decided December 3, 1956, and

It Is Further Ordered that a certified copy of this order, together with copies of the petition, answer and report of

the commissioner, be filed in the proceedings to be instituted before the Commission which proceedings are to be commenced by the defendant within sixty (60) days of this date.

By the Court

Marvin Jones, Chief Judge.

[fol. 23]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND FOR JUDGMENT—Filed March 23, 1959

Defendant moves the Court for an order vacating the suspension of proceedings herein on April 3, 1957, and entering judgment for plaintiff in the amount of $1,663.39.

Attached hereto is a copy of the decision of Division 2 of the Interstate Commerce Commission, dated November 12, 1958, made pursuant to proceedings before the Commission in accordance with the Court's Order of Reference, dated April 3, 1957. Division 2 found that the proper charges to be applied to the shipment in suit were to be based on the export rate for 62 shipments and on the domestic rate for the remaining 13 shipments. Plaintiff was claiming that the domestic rates should be applied to each of the 75 shipments. Division 2 also ordered that the proceedings before the Interstate Commerce Commission be discontinued as per the order attached to the decision.

Plaintiff herein, thereafter filed a petition for reconsideration by the entire Commission of the report of Division 2 dated November 12, 1958. Attached hereto is a copy of the Interstate Commerce Commission's order of March 4, 1959, denying plaintiff's petition for reconsideration.

[fol. 24] In respect to the 13 shipments on which the Commission found that the freight charges should be based upon the domestic rate, plaintiff's petition filed herein and defendant's statement filed with the Interstate Commerce Commission both indicate that plaintiff is due the amounts listed below for each of the shipments if it is found that the freight charges should be based upon the domestic rate.

Plaintiff's Bill No.	From	Waybill Number	Car Number	Amount Due
7-27-9600B	Butler, Pa.	26263	BLE-36251	$ 148.26
7-27-9600B	Butler, Pa.	26264	MP-72565	147.67
7-27-A10090	Follansbee, W. Va.	6254	PRR-510910	125.58
7-27-A10090	Follansbee, W. Va.	6255	PRR-41111	125.58
7-27-A10090	Follansbee, W. Va.	6472	BH-71550	125.58
7-27-A10090	Follansbee, W. Va.	6663	C&O-1245	136.50
7-27-A10090	Follansbee, W. Va.	6662	PRR-49907	136.50
7-27-A10090	Follansbee, W. Va.	6325	PRR-596909	125.58
7-27-A10090	Follansbee, W. Va.	7005	C&O-85430	106.47
7-27-A10090	Follansbee, W. Va.	6473	PRR-121117	125.58
7-27-B10090	Follansbee, W. Va.	7573	SAL-17282	139.05
7-27-B10090	Follansbee, W. Va.	7249	PRR-35200	133.12
9-27-57863	Canton, Ohio	386701	RI-142881	87.92
			Total	$1,663.39

Defendant concedes that plaintiff is due said amount of $1,663.39 for the above listed shipments. Defendant alleges that plaintiff is due nothing for the other 62 shipments, since the Commission found that the charges thereon should be based upon the export rate.

In view of the foregoing, it is respectfully submitted the proceedings before this Court be reactivated, by vacating [fol. 25] the Court's Order of Suspension dated April 3, 1957, and that judgment be entered for plaintiff against defendant in the sum of $1,663.39.

Respectfully submitted,

George Cochran Doub, Assistant Attorney General, Civil Division.

Paris T. Houston, Lewis A. Dille, Attorneys, Civil Division, Department of Justice.

[fol. 26]

EXHIBIT TO MOTION

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 4th day of March, A.D., 1959.

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

Upon consideration of the record in the above-entitled proceeding, petition of The Pennsylvania Railroad Company, defendant, for reconsideration, and reply by the United States of America.

It is ordered, That the petition be, and it is hereby, denied, for the reason that the findings and conclusions in the report of the Commission, Division 2, decided November 12, 1958, are fully supported by the evidence of record, and the matters submitted in support of the petition do not present substantial and material grounds to warrant reopening the proceeding for further reconsideration.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 27]

EXHIBIT TO MOTION

INTERSTATE COMMERCE COMMISSION

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

Decided November 12, 1958.

Just and reasonable charges on 75 carloads of iron and steel articles, steel ingots, and billets shipped from origins in Ohio, Pennsylvania, West Virginia, and Maryland to New York, N. Y., during 1941 and 1942, for export, but not exported through that port because of war conditions, determined. Proceeding discontinued.

George Cochran Doub, *Lewis A. Dille*, and *Paris T. Houston* for complainant.

J. C. Kenney for the Department of the Army.

William F. Zearfaus and *Paul F. McArdle* for defendant.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS WINCHELL, MURPHY, AND GOFF

BY DIVISION 2:

The modified procedure was followed. Oral hearing was held to permit the parties to examine certain witnesses with respect to matter introduced under the modified procedure, and for the introduction of additional evidence. Exceptions to the examiner's proposed report were filed by the defendant, and the complainant replied. Exceptions and requested findings not specifically discussed in this re-

port nor reflected in our findings or conclusions have been considered and found not justified.

A petition by the defendant that we require certain witnesses to produce underlying data and documentary evidence relating to certain assertions made in the complainant's statement of facts and argument was denied by the [fol. 28] Commission, as was a request by the defendant for oral argument. The defendant has filed a petition for reconsideration of the order denying its request for oral argument. No error in the order of denial is specified, nor is it shown that any substantial purpose would be served by granting oral argument. Accordingly, the petition is denied.

By petition filed on May 28, 1957, as amended, the complainant requests a finding that the charges sought to be collected by the defendant on 75 carloads of iron and steel articles, billets, and steel ingots, on the basis of the applicable domestic rates,[1] are unjust and unreasonable, and that the just and reasonable charges are those originally collected based on the corresponding export rates. The considered shipments moved from origins in Ohio, Pennsylvania, West Virginia, and Maryland, to the port of New York, N. Y., during the period December 1941 through November 1942, for exportation to Great Britain. However, because of war conditions, the shipments were not exported through that port, but were later exported through other ports and to Canada. The instant petition was filed pursuant to an order of the United States Court of Claims, dated April 3, 1957, in which the Court instructed the complainant, defendant in a proceeding pending before the Court, to institute this proceeding in order to obtain a determination by this Commission of the "proper charges to be applied to the shipments involved in this suit", the 75 shipments here considered. The defendant herein instituted the proceeding before the Court of Claims for judgment in the amount of the difference between the charges col- [fol. 29] lected and charges based on the applicable domestic rates. The court proceeding is being held in abeyance pending our determination herein.

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[1] Rates are stated per 100 pounds, except where otherwise indicated.

The shipments moved on commercial bills of lading which clearly indicated that the ladings were intended for export. Charges were prepaid by the shippers at the export rates. On 40 shipments of sheet steel originating at Canton, Ohio, in September 1942, the export rate charged was 28 cents; the corresponding domestic rate was 43 cents. On 21 shipments of billets from Sparrows Point, Md., in September 1942, the export and domestic rates were, respectively, $2.68 and $4.26 a gross ton, and on 10 shipments of tin plate from Follansbee, W. Va., during December 1941 and early January 1942, they were 23 cents and 36 cents. On 2 shipments of sheet iron from Butler, Pa., in April 1942, a shipment of steel ingots from Pencoyd, Pa., in September 1942, and a shipment of tin plate from Munhall (Irvin), Pa., in November 1942, the export rates charged were 24 cents, $2.45 a gross ton, and 24 cents, and the corresponding domestic rates were 38 cents, $4.08 a gross ton, and 38 cents.

Upon arrival at New York, the shipments were unloaded and placed in ground storage at Greenville piers or Manhattan Piers, which are railroad storage yards with lighterage facilities. Due to the activity of enemy submarines off the Atlantic coast and other conditions incident to the prosecution of the war, there was a lack of available shipping space and the shipments could not be loaded aboard vessels at New York for overseas destinations. Subsequently, 21 of the shipments were forwarded by rail to Hamilton, Ontario, Canada. The remaining 54 shipments were later transported from New York by rail and exported from other ports. All were eventually exported from west coast ports, except two of the shipments which respectively [fol. 30] moved through New Orleans, La., and Baltimore, Md. The rail charges from New York on the shipments are not at issue here.

The tariff in which the export rates were published contained a provision that such rates would apply only if traffic moving thereunder did not leave the possession of the carrier at the port to which initially consigned. The shipments were not exported through the port of New York, and did ultimately leave the possession of the originating carrier prior to exportation. Thus, the conditions of the tariff rule were not fully complied with, and the export

rates were not applicable on these shipments to New York. The complainant concedes that the domestic rates charged were applicable.

After the shipments had been forwarded from New York, the defendant submitted to the Government supplemental bills for additional freight charges based upon the difference between the export and domestic rates applicable to the shipments to New York. These bills were paid without question, but upon further audit the amounts claimed were deducted from other amounts due the defendant.

Effective December 28, 1942, after these shipments had moved, the defendant established what is commonly known as its "frustrated freight tariff", containing rules governing the application of rates on shipments consigned to a port for export which, after arrival at the port, owing to the war emergency, were reshipped as new shipments to another port. They provided that if the traffic were reshipped to another port for export over a route over which the through rate from the point of origin to the port through which the shipments actually are exported did not apply, the export rate to the port originally consigned, plus [fol. 31] the export rate from that port to the port through which the shipments were actually exported, would apply.

The complainant relies principally upon the following: (1) the shipments were marked "for export" and were consigned to the British Ministry of War Transport; (2) on at least 62 of the shipments arrangements for vessel space were made prior to shipments; (3) each shipment was in continuous possession of the carrier until forwarded from New York by rail; (4) all conditions of the export tariff were complied with except actual delivery to shipside at New York; (5) failure to export through the port of New York was due to conditions beyond the control of the parties; and (6) the export tariff was amended shortly after the shipments moved so that shipments moving under like circumstances thereafter were accorded the export rates.

During the period of movement of most of these shipments, the Office of Defense Transportation was charged with the responsibility of governing the movement of traffic to the ports with a view to preventing congestion and

insuring the free movement thereto of war materials. Its general order O.D.T. 16, issued July 6, 1942, provided, among other things, that shipments to ports could be made only after issuance by that agency of a permit called "O.D.T. block permit." Such a permit was issued covering a specified shipment only when definite cargo space at the port was then available or sufficient assurances were received by O.D.T. officials that cargo space would be available within a reasonable time after the arrival of the freight at the port. The shipping papers were required to make reference to such a permit by number, and the [fol. 32] bills of lading covering 62 carloads bore the notation "O.D.T. block permit" with appropriate numbers. Twelve shipments moved prior to the issuance of the general order and necessarily show no reference to such a permit. The bill of lading covering one carload of sheet steel shipped on September 23, 1942, from Canton also failed to show such permit information. Although the complainant contends that cargo space had been arranged prior to shipment for all 75 carloads, there is no factual evidence of record to substantiate such a contention as to the aforementioned 13 shipments.

The defendant argues that the record does not substantiate the claim that the cargo reservation was made on any of the 75 shipments. It asserts that the mere showing of the O.D.T. permit number on the bill of lading does not constitute sufficient evidence that cargo space was reserved. It emphasizes that general order O.D.T. 16 permitted the issuance of an "O.D.T. block permit" in circumstances where it was found that cargo space would be available within a reasonable time after the arrival of the freight, and contends that it should be afforded an opportunity to determine whether those responsible for issuing the permits did so on the chance that space would be available but without definite knowledge of the fact. It renews its exception, made at the oral hearing, to the Commission's denial of its request that witnesses testifying as to the circumstances surrounding the issuance of such permits be required to produce the underlying data upon which their conclusions are based. That request was denied on the ground that, among other things, any documents produced would be in

substantiation of evidence previously submitted by the complainant, and any insufficiency of such evidence may prop- [fol. 33] erly be determined after cross-examination of witnesses. These witnesses testified, on cross-examination, that prior reservation of cargo space was a condition precedent to the issuance of a permit and that the permits here in question were issued in the regular course of business. The defendant produced no evidence to the contrary. In our opinion, the notations appearing on the bills of lading, together with the oral and written testimony of the complainant's witness with respect thereto, sufficiently establish that cargo space had been arranged prior to the movement of 62 of the shipments.

The question of the proper charges on "frustrated shipments" such as those here considered, has been before this Commission for determination in a number of proceedings cited by the parties. In some cases, the charges at the domestic rates were found unjust and unreasonable, while in others the requests for relief were denied. In some of the cases cited an award of reparation was unopposed by the carriers. The decision in each proceeding was made upon the facts and circumstances surrounding the specific movements. A prime factor for consideration in complaints involving shipments of "frustrated freight" is whether vessel space was reserved prior to shipment. This tends to indicate whether or not due diligence was exhibited on the part of the shippers to avoid noncompliance with the provisions of the export tariff. The defendant, however, submits that the theory of diligence or lack of diligence in arranging for vessel space is far outweighed by other considerations incident to the rates here under attack. The record does not substantiate this view.

In *Pacific Chemical & Fertilizer Co.* v. *Pennsylvania R. Co.*, 268 I.C.C. 468, decided May 21, 1947, the Commission [fol. 34] found that the complainant failed to exercise due diligence in arranging for the delivery and ocean transportation of its shipments, thereby precluding an award of reparation to the basis of the export rates. It viewed the findings in a number of proceedings on this subject which are pertinent here, stating, at pages 471-472:

In *California Texas Oil Co.* v. *Bessemer & L.E.R. Co.*, 264 I.C.C. 147, division 3 found that domestic rates applicable on exported traffic, because it had left the possession of the carrier in circumstances like those which affected the shipments under consideration, were not shown to have been unreasonable. The division said at page 149:

> Division 2 in *C.B. Fox Co.* v. *Gulf M. & O.R. Co.*, 246 I.C.C. 561, *River Petroleum Corp.* v. *Yazoo & M. V. R. Co.*, 258 I.C.C. 1, and *Mid-Continent Petroleum Corp. v. Illinois Central R. Co.*, 258 I.C.C. 422, found that charges higher than those based on coastwise or export rates on shipments which could not be exported or moved coastwise because of war conditions, were unreasonable under circumstances shown. When the shipments involved in the instant proceeding were forwarded from origins the complainants were aware of the war conditions affecting exportations from New York; yet they made no prior arrangements for vessel space for transshipment beyond that port. In short, they were willing to take a chance of obtaining the necessary vessel space. The situation in this respect is no different from that disclosed in a similar proceeding, *Haulon-Buchanan, Inc.* v. *Burlington-R. I. R. Co.*, 258 I.C.C. 519, the dismissal of which by the Commission was affirmed in its report on further hearing, 263 I.C.C. 603, decided October 2, 1945. There, the Commission accorded substantial and apparently controlling weight to the fact that the complainant made no prior arrangement for vessel space. See also the report of Division 3 in *America Republics Corp.* v. *Wichita Falls & S. R. Co.*, 259 I.C.C. 605, dismissing a similar complaint. A petition subsequently filed by complainant in that proceeding for reconsideration was denied by the Commission. Moreover, in neither of those proceedings did the fact of subsequent modification of the restrictive provisions affecting the application of export rates to so-called "frustrated" shipments influence the decisions therein.

In the second report in *Hanlon-Buchanan, Inc.* v. *Burlington-Rock Island R. Co.*, 263 I.C.C. 603, the Commission discussed the proceeding referred to in the quotation above and as to the three decisions by division 2, said, at page 605:

> [fol. 35] In each of those proceedings the complainants exercised diligence in arranging for sale of the commodities shipped and for the vessel space prior to shipment from origins, and the failure of the traffic to move in export or coastwise commerce from the ports was due to causes beyond their control.

The foregoing discussion is applicable to the facts before us in this proceeding.

The domestic rates sought to be charged on these shipments, other than the 21 shipments of billets and the one shipment of steel ingots, are on the basis of the distance scale of maximum reasonable rates prescribed by the Commission for application within official territory on iron and steel articles in *Iron and Steel Articles*, 155 I.C.C. 517, plus subsequent general increases. The defendant claims the benefit of the well-known principle laid down by the United States Supreme Court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, to the extent that the domestic rates included amounts prescribed by the Commission. In that proceeding, the Court held that where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, by declaring its own prior finding as to reasonableness to be erroneous, subject a carrier which has conformed thereto to the payment of reparation measured by what the Commission at such later time declares it should have decided in the earlier proceedings to be a reasonable rate. The defendant urges that the Commission-prescribed rates sought to be collected cannot be found to be unlawful, and contends that charges computed on such basis thus are the "proper charges" on the considered shipments.

In the case cited, the Supreme Court stated, on page 391, that the " . . . case turns upon the power of the Interstate [fol. 36] Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it." In the instant proceeding, no reparation is sought and none will here be awarded. The complainant does not assail the reasonableness of the domestic rate, as such, but alleges that charges based thereon, in view of the fact that the shipments ultimately were exported and of the extraordinary circumstances shown in connection therewith, were unjust and unreasonable to the extent that they exceeded those based on the export rates from and to the same points. We find that the defendant's contention in this respect is without merit. Under somewhat similar circumstances, a like finding was made by division 3 in *Standard Oil Co. of New Jersey* v. *Pittsburgh & L. E. R. Co.*, 259 I.C.C. 793, 797.

We find that on 62 of the shipments here concerned; that is, 39 carloads of sheet steel shipped from Canton, 21 carloads of billets shipped from Sparrows Point, 1 carload of steel ingots shipped from Pencoyd, and 1 carload of tin plate from Munhall, the charges based on the domestic rates were unjust and unreasonable to the extent that they exceeded charges based on the rates contemporaneously maintained on export shipments from and to the same points. We further find that just and reasonable charges on the remaining 13 shipments; that is, 10 carloads of tin plate from Follansbee, 2 carloads of sheet iron or steel from Butler, and 1 carload (RI 142881) of sheet steel from Canton, are those sought to be collected on the basis of the domestic rates.

An order will be entered discontinuing the proceeding.

[fol. 37] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C. on the 12th day of November, A. D. 1958.

No. 32187

UNITED STATES OF AMERICA

v.

PENNSYLVANIA RAILROAD COMPANY

This proceeding being at issue upon a petition of referral from the United States Court of Claims and a reply thereto, and having been duly submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

Harold D. McCoy, Secretary.

(Seal)

[fol. 39]

IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND FOR JUDGMENT—Filed April 3, 1959

Plaintiff opposes the Defendant's Motion to Vacate Suspension of Proceedings and For Judgment and adopts as reasons therefor its Motion to Stay the Proceedings filed this 3rd day of April, 1959.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

[fol. 41]

IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S MOTION TO STAY PROCEEDINGS—
Filed April 3, 1959

Comes now the Plaintiff, through its attorney, and moves this Court for an order to stay the above proceedings and as reason therefor states as follows:

1. Plaintiff, The Pennsylvania Railroad Company, is preparing a complaint to be filed in the appropriate Federal Court to enjoin, set aside and annul the order of the Interstate Commerce Commission dated March 4, 1959.

2. The above matter was referred to the Interstate Commerce Commission and the issues were considered by the Interstate Commerce Commission in its docket No. 32187. Copies of the order of the Interstate Commerce Commission are attached to defendant's motion to vacate suspension of proceedings and for judgment.

3. Plaintiff respectfully requests that this motion be granted until a final decision is rendered on the complaint to enjoin, set aside, and annul the order of the Interstate Commerce Commission.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

Denied: plaintiff is to file within 15 days hereof its response if any to defendant's motion to vacate suspension of proceedings and for judgment filed March 23, 1959; May 13, 1959. M.J.

[fol. 43]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION TO STAY PROCEEDINGS—
Filed April 13, 1959

Defendant moves the Court to dismiss plaintiff's petition herein, pursuant to the provisions of Title 28, U. S. Code, Section 1500, for the reason that plaintiff has filed a petition in a United States District Court seeking adjudication of the matters involved in the present suit and thereby depriving this Court of jurisdiction. Defendant also opposes plaintiff's motion to stay proceedings filed herein on April 3, 1959.

[fol. 44]

MEMORANDUM IN SUPPORT OF MOTION AND OPPOSITION

1

Plaintiff Has Voluntarily Deprived the Court of Jurisdiction.

Plaintiff requests the Court to stay proceedings for the reason that it is preparing a complaint to be filed in the appropriate Federal Court to enjoin, set aside and annul the order of the Interstate Commerce Commission dated March 4, 1959.

Plaintiff has now filed such petition in the United States District Court for the Eastern District of Pennsylvania, entitled "The Pennsylvania Railroad Company, Petitioner v. United States of America and Interstate Commerce Commission, Civil Action No. 26169." A copy thereof is attached hereto as an appendix. The appendices to plaintiff's petition have been previously furnished the Court with defendant's motion to vacate stay of proceedings and enter judgment, and are not reproduced herewith.

The Act of June 25, 1948, 62 Stat. 942, Title 28, U.S.C., Section 1500, reads as follows:

§ 1500. Pendency of claims in other courts.

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States. (June 24, 1948, ch. 646, § 1, 62 Stat. 942.)

[fol. 45] The basic issue involved in the present suit revolved around the question of whether the domestic rates asserted by plaintiff on the shipments to New York, which were intended for export, were reasonable in view of the fact that the exportation of the goods was frustrated through no fault of the parties. The Interstate Commerce Commission had ruled on this question several times and defendant contended that, from such rulings, this Court could decide the question in this case without further reference to the Commission. However, the question of reasonableness of rates is always one found to be within the primary jurisdiction of the Commission and, therefore, the Court suspended further proceedings in the case until an advisory opinion from the Commission was received. That opinion was rendered and was supplied to this Court, along with defendant's motion to vacate the previous order of suspension and to enter judgment in accordance with the Commission's findings.

The advisory opinion of the Interstate Commerce Commission, which is the subject of plaintiff's attack in the District Court action, is an advisory opinion rendered for this Court in connection with the litigation of the issues involved in the present suit. Plaintiff seeks a determination of a District Court on an issue that is for determination by this Court. The Commission's advisory opinion, for all practical purposes, determines the outcome of the present suit. If it can be said that this Court is without jurisdiction to make this determination after securing an advisory opinion from the Interstate Commerce Com-

[fol. 46] mission, then the Court is without jurisdiction of the suit in the first instance and plaintiff's petition should be dismissed. If this Court did have jurisdiction of this suit in the first instance, it now has lost it by reason of plaintiff's action. See: *National Cored Forgings Co.* v. *United States*, 132 C. Cls. 11; *Maguire Industries* v. *United States*, 114 C. Cls. 687.

In taking the matter to the District Court, plaintiff has voluntarily nonsuited itself in this Court by depriving this Court of jurisdiction over the claims involved in this suit.

2

Further Stay of Proceedings Is Not Warranted.

If the Court does not allow defendant's motion to dismiss herein, it should allow defendant's pending motion to vacate the stay of proceedings and enter judgment in accordance with the advisory opinion of the Interstate Commerce Commission.

Defendant maintains that the order of the Commission in Docket No. 32187 is not such an order as contemplated by the provisions of Sections 1336 and 1398 of Title 28, U. S. Code, or by the provisions of Section 17(9) of the Interstate Commerce Act, as amended (49 U.S.C. 17(9)).

The order does not require plaintiff to do anything or to refrain from doing anything. The action of the Commission is merely an ancillary step in the proceedings before this Court and serves to expedite the disposition of the suit before this Court. The Commission did not give effect to its findings by issuing an order requiring the payment of money or the performance of any act [fol. 47] by the parties. Its order of November 12, 1958, was merely a procedural step indicating that the docket was closed. Its order of March 4, 1959, was merely an order that denied plaintiff's request for reconsideration.

Defendant submits that plaintiff has misconstrued his remedy in seeking review of the Commission's action in a separate proceeding brought under the provisions of Title 28, U.S.C., Sections 1336 and 1398.

The jurisdiction conferred by Section 1336 extends to "any order of the Interstate Commerce Commission." Such

jurisdiction does not extend to mere findings and determinations in a Commission report. See: *United States* v. *Atlanta, Birmingham and Coast Ry. Co.*, 282 U.S. 522; *Shannahan* v. *United States*, 303 U.S. 596. It has also been held not applicable to all "orders" of the Commission because, as pointed out in *United States* v. *Griffin*, 303 U.S. 226, 233, practically every step taken by the Commission is preceded by the words "It is ordered." The Commission's determination in Docket No. 32187 is likened to that involved in *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299. There, a suit was brought pursuant to the Urgent Deficiencies Act to set aside and annul the Commission's valuation of railroad property. In holding that the District Court lacked jurisdiction to review the valuation order, the Court said at pages 309-310:

> The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable [fol. 48] under the provisions of the Urgent Deficiencies Act. See *Procter & Gamble Co.* v. *United States*, 225 U.S. 282; *Hooker* v. *Knapp*, 225 U.S. 302; *Lehigh Valley RR. Co.* v. *United States*, 243 U.S. 413; *United States* v. *Illinois Central RR. Co.*, 244 U.S. 82, 89; *Delaware & Hudson Co.* v. *United States*, 266 U.S. 438.
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> * * * * *
>
> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. * * * It was merely preparation for possible action in some proceeding which may be instituted in the future. * * *

Likewise, in the present suit, the Commission's action neither directs plaintiff to perform any action nor to refrain from the performance of any act. It does not affect plaintiff's status, rights or obligations as a carrier subject to regulation under the Interstate Commerce Act. It does not subject plaintiff to any threat of prosecution or other sanction. In other words, it is merely the exercise of the Commission's function of investigation resulting in findings that have application solely to the case pending in this Court.

[fol. 49] The Commission's determination in the case of *Frozen Food Express* v. *United States*, 351 U.S. 40, is wholly unlike the determination here. In that case, after an investigation and hearing instituted on its own motion, the Interstate Commerce Commission issued an order in which it was determined that certain specified commodities were not found to be "agricultural" within the meaning of Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)), which exempts motor vehicles used only in carrying "agricultural commodities" from certain provisions of the Interstate Commerce Act. The Commission's decision was in the form of a report and order. The order incorporated the "findings" and stated that the proceeding "be, and it is hereby, discontinued." The Supreme Court held that such order was reviewable under the provisions of the Urgent Deficiencies Act.

However, in so holding, the Court distinguished the case of *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299. The Court stated on pages 43 and 44:

> • • • The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The "order" of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. §222(a). Where unauthorized operations occur, the Commission may proceed administratively and issue a cease and [fol. 50] desist order. §204(c). Such orders of the Commission are enforceable by the courts. §222(b).

> And wilful violation of a cease and desist order is ground for revocation of a certificate or permit. §212. The determination made by the Commission is not therefore abstract, theoretical, or academic. Cf. *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 18-19. The "order" of the Commission which classifies commodities as exempt or non-exempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * *

Thus, it is clear that the order in the *Frozen Food Express* case is quite different from that in the present suit and that considered in the *United States* v. *Los Angeles & Salt Lake R. Co.* case, *supra*.

Conclusion

In view of the foregoing, it is clearly apparent that plaintiff's action in filing its petition in the United States District Court deprives this Court of any further jurisdiction in the present suit. It is clearly evident that the Commission's action in Docket No. 32187 is not one subject to review by a Federal District Court, but is subject to whatever weight this Court may determine in disposing of the present suit.

Therefore, defendant respectfully requests the Court to grant defendant's motion to dismiss. If the Court denies such motion, defendant then respectfully requests the Court to deny plaintiff's motion to stay proceedings herein. Defendant then further requests the Court to grant defen- [fol. 51] dant's prior motion to vacate its order of suspension and to enter judgment in accordance with the Interstate Commerce Commission's decision in Docket No. 32187.

Respectfully submitted,

George Cochran Doub, Assistant Attorney General, Civil Division.

Paris T. Houston, Lewis A. Dille, Attorneys, Civil Division, Department of Justice.

[fol. 52] EXHIBIT TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 26169

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

PETITION TO ENJOIN, SET ASIDE AND ANNUL AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

I.

The petitioner, The Pennsylvania Railroad Company, brings this action against the Interstate Commerce Commission and United States of America to enjoin, set aside and annul a certain order made and issued by the Interstate Commerce Commission, Division 2 (hereinafter referred to as the Commission) on November 12, 1958, in a proceeding known as United States of America v. Pennsylvania Railroad Company, Docket No. 32187. Copies of the said order and the report made and issued by the Commission in that proceeding, which by the terms of the order is made a part thereof, are attached to this petition and made a part hereof by reference as Appendices A and B, respectively. Petitioner's request in that proceeding for reconsideration by the entire Commission of the decision of November 12, 1958, was denied by an order made and issued by the Commission on March 4, [fol. 53] 1959. A copy of such order is attached hereto and made a part hereof by reference as Appendix C.

II.

This action arises under, the United States is made a defendant herein, and the jurisdiction of this court rests on, the Act of June 25, 1948, c. 646, 62 Stat. 869, 931, 932, 28 U.S.C.A., Sections 1336, 1398, and Section 17(a) of the Interstate Commerce Act, 54 Stat. 799, 916, 49 U.S.C.A. Sec. 17(9).

III.

Petitioner is a corporation of the Commonwealth of Pennsylvania having its principal office in Philadelphia, Pennsylvania.

IV.

This proceeding involves the freight charges on certain carloads of iron and steel articles, steel ingots and billets shipped from origins in Ohio, Pennsylvania, West Virginia, and Maryland to New York, N. Y., during the years 1941 and 1942. The shipments were intended for export through the port of New York but were not exported through that port because of war conditions. Two sets of rates were in effect. One set was the export rates which could be assessed only when certain requirements set forth in a tariff filed with the Interstate Commerce Commission were met. The other set of rates was the domestic rates which were higher than the export rates and were applicable when the requirements of the export tariff were not met.

V.

The tariff requirements which were conditions precedent to the assessment of the export rates were not met in [fol. 54] connection with the shipments here involved and the domestic rates were assessed and collected. Later, upon the alleged authority of Section 322 of the Transportation Act of 1940 (54 Stat. 955, 49 U.S.C.A. Sec. 66), the United States deducted the difference between the domestic rates and the export rates from freight bills on subsequent shipments. The Railroad Company instituted suit before the United States Court of Claims to recover

that difference. Upon petition of the United States the Court of Claims suspended further proceedings before it "pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments * * * ."

VI.

The matter came before the Commission in its Docket 32187 mentioned above, and the Commission in its report of November 12, 1958, after pointing out that the United States concedes that the domestic rates charged were applicable concluded that assessment of the domestic rates was reasonable in connection with certain of the shipments and unreasonable in connection with others; basing its conclusions solely upon whether or not due diligence was exhibited on behalf of the shippers to avoid non-compliance with the provisions of the export tariff.

VII.

The Commission entirely ignored its obligation to determine whether the rates were just and reasonable in and of themselves with regard to the service rendered.

VIII.

The Commission entirely ignored the fact that there is no evidence of record that the rates were unjust and [fol. 55] unreasonable in and of themselves with regard to the service rendered.

IX.

The Commission erred in that the level to which it found certain of the rates to have been unreasonable is lower than the level which the Commission had previously prescribed for transportation of the same commodities from and to the same points.

X.

The report and order of the Commission of November 12, 1958, (Appendices A and B) to the extent that they find that the rates charged on certain of the shipments

are unjust and unreasonable, are unlawful and void, and beyond the power of the Commission to make for the following reasons:

(a) In making said report and order the Commission failed to consider material evidence of record.

(b) The Commission misapplied the law.

(c) The conclusion that certain of the rates were unjust and unreasonable is not predicated upon any evidence or finding that said rates were unjust and unreasonable in and of themselves with regard to the transportation service rendered.

(d) The Commission has proceeded upon the assumption that power has been conferred upon it to determine that a rate is unjust and unreasonable because of the Commission's belief as to the equities of the situation.

(e) The Commission has concluded that the rates on certain of the shipments were unreasonable to a level which is lower than that which was prescribed by the Commission itself in an earlier proceeding.

[fol. 56] (f) The Commission failed to make the findings of the basic facts upon which it predicates its conclusion that charges on certain of the shipments were unjust and unreasonable.

(g) The findings of fact made by the Commission are not supported by evidence.

(h) The Commission's report and order are otherwise arbitrary, capricious, and without support in, and contrary to law and the evidence.

By reason of the arbitrary and capricious action and errors of law of the Commission in entering its order of November 12, 1958, petitioner is left without an adequate remedy at law and will be subject to irreparable damage if the relief herein prayed for is not granted.

WHEREFORE, your petitioner prays that:

1. On final hearing and submission of this case, the court adjudge and determine that the report and order of the Interstate Commerce Commission of November 12, 1958 (Appendices A and B) are unlawful, arbitrary, and capricious, without support in and contrary to law and the evidence; that a decree be entered appropriately enjoining, setting aside, and annulling the said order; that the matter be remanded to the Commission for further action not inconsistent with this court's decree;

[fol. 57] 2. This petitioner have such other and further relief in the premises as the nature of the case shall require and as to this court seems proper.

Respectfully submitted,

THE PENNSYLVANIA RAILROAD COMPANY

By its Attorney

/s/ William F. Zearfaus
William F. Zearfaus
1138 Transportation Center
Six Penn Center Plaza
Philadelphia 4, Pa.

Paul F. McArdle
Union Trust Building
Washington 5, D. C.
Of Counsel

April 3, 1959.

[fol. 59]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REPLY TO THE DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STAY PROCEEDINGS —Filed April 23, 1959

For the convenience of this Court, plaintiff is filing this single memorandum in opposition to defendant's motion to dismiss and in reply to the opposition filed by the defendant to plaintiff's motion to stay proceedings.

The cases cited by defendant in support of its motion to dismiss are without merit. Plaintiff filed its petition in this Court. The cases cited by defendant support the statutory authority as set forth in defendant's memorandum. However, in those cases, a complaint involving the same subject matter had been filed in a court prior to the filing of a petition in this Court. Plaintiff in this instance did not file any complaint in any Federal court prior to the filing of its petition in this Court.

Title 28 U.S.C.A., § 1336 provides:

[fol. 60] "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Title 28 U.S.C.A., § 1398 provides:

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Plaintiff has no alternative but to follow the statutory authority to enforce, enjoin, set aside or annul such order.

The most recent expression of a case directly in point is *Davidson Transfer & Storage Co.* v. *United States*, 164 F. Supp. 571 (D. Md. 1958). In the *Davidson* suit, an original proceeding was filed in the United States District Court for the District of Columbia. Upon motion of the United States, the District Court action was stayed pending a reference and a determination of the reasonableness of the rates by the Interstate Commerce Commission. The Interstate Commerce Commission issued an order determining the issue of reasonablensss in aid of the pending court action and found that the rates were unreasonable. In compliance with the statutory authority, the plaintiff, Davidson Transfer & Storage Co., filed a complaint in the United States District Court for the District of Mary- [fol. 61] land. The United States, as a defendant, admitted jurisdiction of the District Court to review the action of the Interstate Commerce Commission. The Interstate Commerce Commission denied that the Federal court had jurisdiction, contending that the determination of the Interstate Commerce Commission is not an order within the meaning of any act authorizing separate suits in the Federal District Court. The opinion of the District Court rejected the argument raised by the Interstate Commerce Commission. It is interesting to note in this opinion that a reference is made to the jurisdiction of the United States Court of Claims. The opinion states, at page 574:

> "It appears that the Court of Claims has no jurisdiction to review orders of the Commission; . . ."

Plaintiff in this case finds itself in the position of attempting to have an order of the Interstate Commerce Commission reviewed. Since this Court does not have jurisdiction to review orders of the Interstate Commerce Commission, plaintiff is required to file a petition in compliance with the statutory authority. Since the principal office of the plaintiff is located in Philadelphia, Pennsylvania, such action has to be filed in the United States District Court for the Eastern District of Pennsylvania.

Defendant attacks in part the determination made by the Interstate Commerce Commission. Defendant suggests [fol. 62] that such determination is not an order of the

Interstate Commerce Commission. Attached to defendant's Motion to Vacate Suspension of Proceedings and For Judgment, filed March 23, 1959, are the orders issued by the Interstate Commerce Commission. These orders show on their face a full determination made by the Interstate Commerce Commission. These orders do not support defendant's contention that the determination of the Interstate Commerce Commission was in the nature of an advisory opinion to this Court.

Plaintiff requests that the action now pending in this Court be stayed until a determination of the petition now filed in the above-mentioned Federal court. Since plaintiff is to receive compensation in these proceedings, defendant cannot complain that it will be injured by any delay.

For the reasons set forth above, it is respectfully requested that the defendant's motion to dismiss be denied, and plaintiff's motion to stay the proceedings be granted.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

[fol. 63]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND FOR JUDGMENT—Filed May 27, 1959

By order of this Court dated May 13, 1959 plaintiff files this reply to defendant's motion to vacate suspension of proceedings and for judgment.

Plaintiff opposes the granting of defendant's motion for the following reasons:

1. There is pending in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 26169, a petition filed by the plaintiff to enjoin, set aside and annul an order of the Interstate Commerce Commission.

2. Title 5 U.S.C.A., Section 1009 provides that any person suffering a legal wrong because of any agency action or adversely affected or aggrieved by such action shall be entitled to judicial review. Title 28 U.S.C.A., Section 1336 provides that a district court shall have jurisdiction [fol. 64] to enforce, enjoin, set aside and annul any order of the Interstate Commerce Commission.

3. If this Court should enter an order granting the defendant's motion such order would estop the plaintiff from asserting its claim for the reason that the statute of limitations would bar any further action.

4. Since the judgment is an award in favor of the plaintiff the defendant cannot complain of any injury by delay.

Argument No. 1

By an order of this Court dated April 3, 1957 the proceeding was referred to the Interstate Commerce Commission. The Interstate Commerce Commission assigned it Docket No. 32187 and set it down for hearing under its modified procedure. The parties submitted statements of fact and briefs, oral testimony was taken, the Examiner issued his proposed report, exceptions were filed to the proposed report and a report and order was issued by the Interstate Commerce Commission. This plaintiff filed a petition for reconsideration and on March 4, 1959 the Interstate Commerce Commission issued an order denying the petition for reconsideration and reaffirmed its original report and order dated November 12, 1958.

[fol. 65] In the report and order of the Interstate Commerce Commission dated November 12, 1958 the Commission found that the rates charged by this plaintiff were just and reasonable as to 13 shipments. In addition the Commission found that the rates charged on the remaining 62 shipments were unjust and unreasonable.

This plaintiff challenged the findings and order of the Commission insofar as they related to the 62 shipments. In order to attack the order of the Commission and in compliance with the applicable statutes, a petition was filed in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 26169, in which the

Pennsylvania Railroad Company is the petitioner and United States of America and the Interstate Commerce Commission are the defendants. This petition requests that the order entered by the Interstate Commerce Commission be enjoined, set aside, and annulled.

If the District Court should find that the order of the Commission was in error then the plaintiff would be entitled to a further hearing before the Interstate Commerce Commission in compliance with the order of the District Court. The further hearing before the Interstate Com- [fol. 66] merce Commission may result in the finding that the rates on the 62 shipments in dispute were just and reasonable and enter an order in accordance with such findings. Such an order by the Commission would affect the total judgment entered by this Court. Until the District Court enters its order on the petition filed by the plaintiff, followed by a hearing at the Commission, it is premature for this Court to enter an order granting the defendant's motion.

Argument No. 2

The Administrative Procedure Act, Title 5 U.S.C.A., Section 1001, *et seq.* controls judicial review of an order of an administrative agency. Section 10 of this Act (Title 5, U.S.C.A., Section 1009) allows any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such act, to judicial review. Every agency action made reviewable by statute shall be subject to judicial review.

Title 28, Section 1336 provides:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[fol. 67] In order for the plaintiff to challenge the order of the Interstate Commerce Commission it must comply with the statutory requirements as set forth above. If this Court should enter an order granting the motion of the defendant it would in effect deny the plaintiff its statutory right of judicial review.

This Court does not have jurisdiction to review orders of the Interstate Commerce Commission. See *U.S.* v. *Jones*, 336 U.S. 641 (1948) and *Davidson Transfer and Storage Co.* v. *U.S.*, 164 F. Supp. 571 (D. Md. 1958).

Argument No. 3

As shown in Exhibit A attached to the petition filed in this Court the date of deduction, which controls the period of limitations, occurred during the years 1946 and 1947. This action was filed on February 7, 1951 within the statutory period of six years. If ordered by the District Court, the Commission on further hearing may determine that the rates on the disputed 62 shipments are just and reasonable. If this Court should enter an order granting the defendant's motion plaintiff would be estopped by the applicable period of limitation from filing its claim as to the disputed 62 shipments. Since the Commission [fol. 68] cannot award reparation the plaintiff would have no remedy in this Court, or in any other court or agency to collect its charges.

Argument No. 4

In the defendant's motion it is requested that judgment be entered for the plaintiff in the amount of $1,663.39 representing the rates found just and reasonable by the Commission on the 13 shipments. Since defendant would be required to pay the above amount it cannot complain that a delay in this proceeding would affect any possible recovery to it.

For the reasons set forth above it is respectfully requested that the defendant's motion to vacate the suspension of proceedings and enter judgment for plaintiff be denied. It is further requested that this court take no action until the District Court enters an order on the petition filed by this plaintiff.

Plaintiff requests oral argument.

Respectfully submitted,

Paul F. McArdle, 701 Union Trust Building, Washington 5, D.C., Attorney for Plaintiff.

[fol. 69]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER OF THE COURT GRANTING DEFENDANT'S MOTION TO VACATE SUSPENSION OF PROCEEDINGS AND ENTERING JUDGMENT—June 5, 1959

On April 3, 1957, further proceedings in this case were suspended and a referral to the Interstate Commerce Commission was ordered so that the Commission could make a determination "in aid of court litigation" as to the proper charges to be applied to the shipments involved in this suit, the court having found that this case warranted such a procedure. *United States* v. *The Western Pacific Railroad Co.*, 352 U.S. 59; *T.I.M.E. Inc.* v. *United States*, No. 68, October 1958 Term, Supreme Court, decided May 18, 1959.

On November 12, 1958, the Interstate Commerce Commission determined that as to certain shipments in issue the rates urged by the plaintiff were unjust and unreasonable, while as to others the rates were just and reasonable.

On March 23, 1959, the defendant on the basis of the Interstate Commerce Commission determination moved to vacate the suspension of proceedings and for judgment in accordance with the Interstate Commerce Commission determination which judgment would provide for recovery of $1,663.39 by plaintiff in satisfaction of all claims set forth in the petition. On May 27, 1959, plaintiff filed its opposition to this motion urging that proceedings here be continued in suspension pending a district court decision [fol. 70] on its petition to enjoin, set aside and annul the Interstate Commerce Commission determination made on referral by this court. Such a procedure we find inapplicable here. See cases cited, *supra*.

Now, Therefore, It Is Ordered this fifth day of June, 1959, that defendant's motion to vacate the suspension of proceedings be and the same is granted, and

It Is Further Ordered on the basis of the record made in this case, including the determination by the Interstate Commerce Commission, that judgment be and the same is entered for plaintiff in the sum of one thousand six hundred sixty-three dollars and thirty-nine cents ($1,663.39).

By the Court

Marvin Jones, Chief Judge.

[fol. 71] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 72]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 21, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1959.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 21st day of August, 1959.

[fol. 73]

SUPREME COURT OF THE UNITED STATES

No. 451, October Term, 1959

PENNSYLVANIA RAILROAD COMPANY, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
OCT. 2 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner, The Pennsylvania Railroad Company, prays that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The Court of Claims delivered no opinion. Its order directing the entry of judgment is unreported. It appears as an Appendix hereto, at page 1a, *infra*.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1959. On August 21, 1959, the time to file a

petition for writ of certiorari was extended by order of Mr. Justice Stewart to and including October 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission, entered in a proceeding had on referral from the Court of Claims, declaring certain rates of a common carrier by rail to have been unreasonably high as applied to past shipments a judicially reviewable "order" within the meaning of 28 U.S.C. § 1336 and 49 U.S.C. § 17(9), when the legal consequence of the order is finally to relieve a shipper of its obligation to pay the carrier for past transportation services charges computed on the basis of those rates?

STATUTES INVOLVED

This case involves primarily Sections 1336 and 1398 of the Judicial Code, and Section 17(9) of the Interstate Commerce Act. These provisions read as follows:

28 U.S.C. § 1336.

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

49 U.S.C. § 17(9).

> "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been

made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

28 U.S.C. § 1398.

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

STATEMENT

The result of the Court of Claims decision in this case is that petitioner's claim against the United States for freight charges has been forever foreclosed by an administrative order the lawfulness of which petitioner has never been permitted to challenge in any court.

Petitioner is a common carrier by rail and is subject to the regulatory provisions of Part I of the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.* In 1941 and 1942 petitioner transported for the United States certain shipments of iron and steel articles. The shipments were intended for export through the port of New York but were not there exported due to war conditions. Two sets of rates then filed and effective were potentially applicable to the shipments in question; a lower "export rate" and a higher "domestic rate".

The United States was billed, and made payment, on the basis of the domestic rate. Subsequently, purporting to act pursuant to § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U.S.C. § 66, the United States deducted from other freight charges due petitioner the difference between the export rate and the domestic rate as to each of the shipments, taking the position that although the domestic rate was applicable to the shipments it was unreasonable insofar as it exceeded the export rate.

Petitioner sued in the Court of Claims, 28 U.S.C. § 1491, seeking to recover this difference, which amounted to $7,237.87. After trial to a Commissioner and argument before the Court of Claims, that Court held on April 3, 1957 that the doctrine of primary jurisdiction required it to suspend the proceedings before it "pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments . . ."

In accordance with this order of suspension, the United States on May 28, 1957 filed in the Interstate Commerce Commission a petition of referral. ICC Dkt. No. 32187. The case was heard by an Examiner, who on May 5, 1958 issued a proposed report finding that the domestic rate was reasonable as to 12 of the 75 shipments involved but as to the remaining 63 was unreasonable insofar as it exceeded the export rate. Petitioner's exceptions to the proposed report were overruled by Division II of the Commission on November 12, 1958, and petitioner's petition for reconsideration by the entire Commission was denied on March 4, 1959.

On March 23, 1959 the United States filed in the Court of Claims a motion to vacate the order of suspension and for judgment for petitioner in the amount of $1,663.39, the portion of the total recovery sought found by the Commission to have represented reasonable charges. Petitioner opposed this motion, asking that the suspension of proceedings in the Court of Claims be continued until petitioner had had an opportunity to file and have determined, in the appropriate District Court, a complaint seeking to set aside and annul the order of the Interstate Commerce Commission. On April 3, 1959, petitioner filed such a complaint in the District Court for the Eastern District of Pennsylvania, invoking the jurisdiction of that Court under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9).[1]

The United States opposed petitioner's motion further to stay the Court of Claims proceeding, urging that the order of the Interstate Commerce Commission upon which it relied in its motion for entry of judgment was not reviewable under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9) because not in fact an "order" but rather merely an "ancillary step" in a judicial proceeding, and that therefore there was no occasion further to delay the entry of judgment.

On June 5, 1959, the Court of Claims issued an order granting the motion of the United States to

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[1] The case was brought in that judicial district because of the venue requirements of 28 U.S.C. § 1398. It was brought before a single-judge District Court. See United States v. Interstate Commerce Commission, 337 U.S. 426; Davidson Transfer & Storage Co. v. United States, 164 F. Supp. 571 (D. Md. 1958); Eastern Freight-Ways, Inc. v. United States, 170 F. Supp. 848 (D.N.J. 1959).

vacate the order of suspension, and directing the entry of judgment for petitioner in the amount of $1,663.39.[2]

REASONS FOR GRANTING THE WRIT

1. The action of the Court of Claims in entering judgment on the order of the Interstate Commerce Commission without affording petitioner the opportunity to seek review of the order, on the theory that the order is not judicially reviewable under 28 U.S.C. § 1336, is in direct conflict with the decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U.S. 12, and unless promptly corrected by this Court will create doubt and confusion in an important area of federal law.

In *El Dorado* the Oil Works brought suit against General American Tank Car Corporation (Car Company), seeking to recover monies allegedly due it under a tank car rental agreement. Car Company defended on the ground that a making of the payments demanded would result in a violation of the Elkins Act. 49 U.S.C. 41. The District Court rendered judgment for Car Company, and the Court of Appeals reversed. 104 F.2d 903. This Court in turn reversed the Court of Appeals, and remanded the case with directions that the District Court should suspend the proceedings before it until the Interstate Commerce Commission had passed on the legality of the challenged past practices in proceedings had before the Commission pursuant to the remand. *General*

[2] The time for the United States and the Interstate Commerce Commission to answer the complaint in the Eastern District of Pennsylvania has been extended by agreement of the parties until after this case is finally determined. Should the judgment of the Court of Claims be permitted to stand, the Pennsylvania case will, of course, be altogether moot.

American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422.

Oil Works thereupon sought in the Commission a declaratory order that payment to it by Car Company of the amounts due under the agreement sued on would not violate the Elkins Act or any other provision of the Interstate Commerce Act. The Commission, after hearing, issued a declaratory order holding that payment of the amount sued upon would "constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6(7) of the Interstate Commerce Act . . ." 328 U.S. at 18. It thereupon ordered that the proceeding before it be discontinued.

Oil Works sought review of this order in the District Court, which dismissed the complaint for lack of jurisdiction on the ground that the action of the Commission did not constitute a reviewable "order" within the meaning of 28 U.S.C. § 41(28) (now 28 U.S.C. § 1336). This Court reversed, pointing out that (328 U.S. at 18-19):

> "the Commission's findings and determination if upheld constitute far more than an 'abstract declaration'. *Rochester Telephone Corp.* v. *United States*, 397 U.S. 125, 143. 'Legal consequences' (*id.* at 132) would follow which would finally fix a 'right or obligation' (*id.* at 131) on appellants' part. These findings are more than a mere 'stage in an incomplete process of administrative adjudication,' for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of 'orders' which *Rochester Telephone Corp.* v. *United States, supra*, held to be reviewable by a district court of three judges.

> The District Court erred in dismissing the complaint for want of jurisdiction."[3]

El Dorado plainly establishes that the action of the Interstate Commerce Commission in this case constitutes an "order" of which review may properly be had under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9), subject to the venue requirements of 28 U.S.C. § 1398. As in *El Dorado*, the proceedings before the Commission in this case was had on referral from a federal court which suspended proceeding before it pending determination of the issue referred. As in *El Dorado*, the order of the Commission was declaratory in form. As in *El Dorado*, the issue referred to and determined by the Commission controls the outcome of the court litigation. As in *El Dorado*, the issue referred concerned a dispute between the parties as to the legality of past practices of a carrier, first raised as a defense to a suit in the courts for monetary recovery. And as in *El Dorado*, the order of the Commission, unless overturned on review, has "legal consequences" which finally fix a "right or obligation". Under these circumstances petitioner believes that the decision of the Court of Claims is plainly contrary to a controlling decision of this Court, and for that reason merits review by this Court.

The decision below appears to be contrary to *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, where this Court held that an order of the Commission denying reparations to a shipper was reviewable by a single-judge District Court under 28 U.S.C. § 1336, and to *Frozen Food Express* v. *United States*, 351 U.S. 40.

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[3] As to whether a three-judge District Court or a single judge should review the order in this case, see Note 1, supra.

Furthermore, the decision below is in direct conflict with *Davidson Transfer & Storage Co.* v. *United States,* 164 F. Supp. 571, a case virtually identical with the present one on its facts. It was there held that an order of the Commission of precisely the kind here involved was subject to judicial review in accordance with the procedures set forth in 28 U.S.C. § 1336, subject to the venue requirements of 28 U.S.C. § 1398.

2. The decision below warrants review because it is evident that despite *El Dorado* some confusion exists on the part of the United States as to the rule properly to be applied in proceedings of this kind. The United States, respondent here, has in the past asserted and is at the present time asserting in other litigation precisely the position which petitioner unsuccessfully urged before the Court of Claims, and which is diametrically opposed to that taken by the United States in this case. In *Davidson Transfer & Storage Co.* v. *United States, supra,* the United States successfully argued that a declaratory order of the Interstate Commerce Commission declaring past carrier rates to have been unreasonable was reviewable under 28 U.S.C. § 1336. And in *United States* v. *Interstate Commerce Commission,* No. 1057-58, now pending in the District Court for the District of Columbia, the United States has filed suit to review a Commission order, relating to the interpretation of a tariff, which was entered on referral from the District Court for Minnesota, and is relying on 28 U.S.C. § 1336 as the basis for invoking the jurisdiction of the District Court for the District of Columbia.

Since the United States is by statute made a party to many actions brought to review orders of the Commission, 28 U.S.C. § 2323, it has been and frequently

will be called upon to take a position regarding the issue as to which review is here sought. In the interest of sound judicial administration and fairness to private litigants, it is imperative that the principles so clearly enunciated in *El Dorado* be reaffirmed by this Court in order that the United States may not, when it serves its monetary interest to do so, urge and benefit from a rule the exact converse of that which it has successfully pressed in other suits seeking to annul or set aside orders of the Commission.

3. The present case forcefully illustrates the consequences of a holding that an order of the Interstate Commerce Commission of the kind here involved is not subject to judicial review under 28 U.S.C. § 1336. If it cannot be so reviewed, then it is altogether unreviewable, for it is well settled that the Court of Claims has no jurisdiction to review or set aside orders of the Commission. *United States* v. *Jones*, 336 U.S. 641. Thus if the decision of the Court of Claims in this case is permitted to stand petitioner's rights and obligations have been finally fixed by an administrative order which was never subject to any judicial review.

There is nothing in the statutory scheme provided by Congress which suggests that such a result was intended. Had the United States in this case been in the position of a private litigant, and thus been unable to invoke § 322 of the Transportation Act of 1940 to withhold from sums concededly due petitioner on account of unrelated transactions an amount equal to the allegedly unreasonable element of the charges here involved, this suit would doubtless have arisen as an action by the United States before the Interstate Commerce Commission for reparations. Any order entered in such an action is reviewable in the District Courts. See *United States* v. *Interstate Commerce*

Commission, 337 U.S. 426. The order of the Commission in this case has substantially the same consequences as an order entered in an action for reparations. It no less than the latter type of order is wholly ripe for judicial review.

CONCLUSION

Recent decisions of this Court have made it inevitable that the suspension of proceedings brought in the courts which turn on issues within the primary jurisdiction of the Interstate Commerce Commission, and the referral of those issues to the Commission, will become an increasingly familiar practice. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59; *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411. Thus the question of the reviewability of administrative orders entered on such referrals will frequently arise and the decision below, unless promptly corrected by this Court, will create doubt and confusion as to the proper resolution of that question.

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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COVINGTON & BURLING
Of Counsel

October, 1959

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 50027

PENNSYLVANIA RAILROAD COMPANY

v.

THE UNITED STATES

Order

On April 3, 1957, further proceedings in this case were suspended and a referral to the Interstate Commerce Commission was ordered so that the Commission could make a determination "in aid of court litigation" as to the proper charges to be applied to the shipments involved in this suit, the court having found that this case warranted such a procedure. *United States* v. *The Western Pacific Railroad Co.*, 352 U.S. 59; *T.I.M.E. Inc.* v. *United States*, No. 68, October 1958 Term, Supreme Court, decided May 18, 1959.

On November 12, 1958, the Interstate Commerce Commission determined that as to certain shipments in issue the rates urged by the plaintiff were unjust and unreasonable, while as to others the rates were just and reasonable.

On March 23, 1959, the defendant on the basis of the Interstate Commerce Commission determination moved to vacate the suspension of proceedings and for judgment in accordance with the Interstate Commerce Commission determination which judgment would provide for recovery of $1,663.39 by plaintiff in satisfaction of all claims set forth in the petition. On May 27, 1959, plaintiff filed its opposition to this motion urging that proceedings here be continued in suspension pending a district court decision on its petition to enjoin, set aside and annul the Interstate Commerce Commission determination made on referral by this court. Such a procedure we find inapplicable here. See cases cited, *supra*.

NOW, THEREFORE, IT IS ORDERED this fifth day of June, 1959, that defendant's motion to vacate the suspension of proceedings be and the same is granted, and

IT IS FURTHER ORDERED on the basis of the record made in this case, including the determination by the Interstate Commerce Commission, that judgment be and the same is entered for plaintiff in the sum of one thousand six hundred sixty-three dollars and thirty-nine cents ($1,663.39).

BY THE COURT

MARVIN JONES
Chief Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

This case presents questions relating to the reviewability of determinations of the Interstate Commerce Commission which are made "in aid of litigation" on referral by a court. The principal question is whether such determinations are judicially reviewable "orders" of the Commission within the meaning of 28 U.S.C. 1336.[1] The Court of Claims has held, in effect, that they are not. On the basis of the administrative resolution of the issues raised in peti-

[1] 28 U.S.C. 1336 derives from the Urgent Deficiencies Appropriations Act of 1913, 38 Stat. 219. The Act now is codified at 28 U.S.C. 1253, 1336, 2101, 2284, 2321-2325.

tioner's Tucker Act suit and referred to the Commission under the primary jurisdiction doctrine, the court entered a judgment denying in large part the relief sought by petitioner. In doing so, the court declined to stay further the judicial proceedings to enable petitioner to obtain review of the Commission determination in the United States District Court for the Eastern District of Pennsylvania.[2] We do not oppose the granting of the petition for a writ of certiorari.

1. In urging that the determination made by the Commission was within the ambit of 28 U.S.C. 1336, and therefore subject to an independent proceeding in a district court to enjoin, set aside and annul it, petitioner places principal reliance (Pet. pp. 6-8) upon *El Dorado Oil Works* v. *United States*, 328 U.S. 12. That decision does lend considerable support to petitioner's position. At the same time, however, it did not purport to overrule several earlier decisions of the Court holding that not all determinations of the Commission are "orders" reviewable under the Urgent Deficiencies Appropriations Act. See, *e.g.*, *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299; *United States* v. *Griffin*, 303 U.S. 226; *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172; *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U.S. 522; *Shannahan* v. *United States*, 303

[2] Petitioner commenced the proceedings in the Eastern District of Pennsylvania in accordance with 28 U.S.C. 1398, which provides that an action to enforce, suspend or set aside an order of the Interstate Commerce Commission shall be brought in the district of "the residence or principal office of any of the parties bringing such action".

U.S. 596.[3] In concluding that there was no jurisdiction in a district court to review the particular administrative determinations involved in these latter cases, the Court stressed considerations which seem to apply to the Commission decision which this petitioner seeks to challenge.

In *Los Angeles & Salt Lake R. Co., supra*, for example, the Commission had made a valuation determination respecting the property of the carrier. This determination was held not to be reviewable under the Urgent Deficiencies Appropriations Act because (273 U.S. at 309-310):

> [It] is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority,

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[3] In *United States* v. *Griffin, supra*, the Court noted (303 U.S. at 233):

> In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act.

> privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. * * * It was merely preparation for possible action in some proceeding which may be instituted in the future * * *.

In the *Shannahan* case, *supra*, the National Mediation Board referred to the Commission the question of whether a specific electric railway was a "carrier" for the purposes of the Railway Labor Act. Rejecting the endeavor of the railway's trustees to obtain review under the Urgent Deficiencies Appropriations Act of the Commission's resolution of the question, the court observed that the administrative decision (1) had neither the form nor the characteristics of an order; and (2) was without effect upon the railway absent action by some other agency or tribunal. 303 U.S. at 599. And in *Great Northern*, *supra*, the Commission issued two certificates to the Secretary of the Treasury, which reflected the amount which the Commission had determined to be due the carrier by reason of the Government control of the railroads during World War I. The ruling by this Court that the district court was without jurisdiction over the carrier's suit to annul the certificates was based upon the fact that, in issuing them, the Commission was performing a temporary and non-recurrent task, and

that its decision contained "no direction, no word of command". 277 U.S. at 180.

The Commission's determination in the present case similarly possesses neither the form nor the characteristics of an order. It contains no "direction" or "word of command". All that the Commission did was to file a report setting forth its findings and conclusions on the question referred to it by the Court of Claims—and then to order that the administrative proceedings be discontinued. Stated otherwise, the Commission's determination could only be executed through further action in the Court of Claims, for whose benefit the report was made.

2. We are advised by the Commission that it does not maintain statistical data regarding the volume of referrals of administrative questions to it by courts. It is clear, however, that this Court's decision in December 1956 in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, has resulted in a substantial increase of such referrals. Since *Western Pacific*, at least seventeen referrals have been made by the Court of Claims alone. Several district courts also have referred administrative questions arising in suits under the Tucker Act. And it is likely that both federal and state courts have similarly invoked the primary jurisdiction doctrine in litigation between private parties.

3. Because of this increased volume of referrals, a number of district courts recently have been confronted with the precise question involved here. Their decisions are in sharp conflict and reflect the confusion and uncertainty prevailing in this area.

Two district courts have held that determinations made by the Commission on referral are reviewable in an independent proceeding brought for that purpose. *Davidson Transfer & Storage Co.* v. *United States*, 164 F. Supp. 571 (D. Md.); *Eastern Freight-Ways, Inc.* v. *United States*, 170 F. Supp. 848 (D. N.J.). In the *Davidson* case, the court expressly rejected the contention (advanced by the Commission itself) that, since the administrative determination was merely ancillary to the litigation in the referring court, it was reviewable solely by the latter.

On the other hand, at least two other district courts have held, in common with the court below, that there is no independent review in the present circumstances. In *Northern Pacific Ry. Co.* v. *United States*, the Court of Appeals for the Eighth Circuit directed the District Court for the District of Minnesota to refer one of the questions in litigation to the Commission. 213 F. 2d 366. Following an adverse decision by the Commission, the United States instituted a proceeding in the District Court for the District of Columbia to set it aside.[4] Both the Commission and the carrier moved to dismiss for lack of jurisdiction. On October 5, 1959, the court granted the motion on the ground that the report of the Commission was no more than an advisory opinion, and that it was open to the Government to urge in the referring court that it should not be followed.

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[4] In order to permit the United States to do so, the Minnesota district court stayed action on the carrier's motion for summary judgment on the basis of the Commission's report.

United States v. *United States, et al.*, Civil Action No. 1057-58 (D. D.C.).

In *United States* v. *Chesapeake and Ohio R. Co.*, following a remand from this Court (352 U.S. 77), the Fourth Circuit directed the District Court for the Eastern District of Virginia to refer to the Commission the question of the applicability of the export rate to the shipments there involved. 242 F. 2d 732. On the basis of a favorable report by the Commission, the carrier immediately moved for the entry of judgment. On August 31, 1959, the motion was granted notwithstanding the contention of the United States—similar to that of the petitioner here—that it was entitled to obtain independent review of the Commission determination.

4. In *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, this Court held that the Commission's determination there under consideration was an "order" with legal consequences, subject to judicial review under 28 U.S.C. (1946 ed.) 41(28), the predecessor of present Section 1336. But the Court further held that review of this reparation order was not for a three-judge court because (1) the order was not one of national or widespread interest requiring expeditious handling through direct appeal; and (2) a three-judge court has no jurisdiction of Commission orders "for the payment of money" (see 28 U.S.C. 2321). In the *Davidson* and *Eastern Freight-Ways, Inc., cases, supra*, the district courts relied upon this decision in concluding that the Commission's order was reviewable by a one-

judge court.[5]

It is to be noted, however, that in *El Dorado Oil Works* v. *United States*, *supra*, this Court summarily disposed of the jurisdictional question by holding that the Commission's determination with respect to the amount of the car allowance which could be paid to the shipper was within the class of orders "held to be reviewable by a district court of three judges." 328 U.S. at 19. Considering the nature of these orders, it is difficult to distinguish them for purposes of using a three-judge or a one-judge court.

CONCLUSION

For these reasons, we agree that review by this Court is warranted. Although there is no conflict of circuits, there is a conflict among the lower courts with respect to the applicability of 28 U.S.C. 1336 to Commission determinations of the character here involved. The precedents in this Court are not at all clear, and the question is of recurring importance. We believe that it should be expeditiously resolved in the interests of the administration of justice. We do not, therefore, oppose the granting of the petition.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

NOVEMBER 1959.

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[5] Petitioner here brought its proceeding before a single-judge district court for the Eastern District of Pennsylvania (Pet. 5, fn. 1).

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No. 151

Supreme Court of the United States

OCTOBER TERM, 1949

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR PETITIONER, THE PENNSYLVANIA RAILROAD COMPANY

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR PETITIONER, THE PENNSYLVANIA RAILROAD COMPANY

OPINION BELOW

The Court of Claims rendered no opinion. Its order directing the entry of judgment is unreported (R. 49).

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1959 (R. 49). On August 21, 1959, the time to file a petition for a writ of certiorari was extended by order of Mr. Justice Stewart to and including October 3, 1959 (R. 50). The petition for a writ of certiorari was filed on October 2, 1959, and was granted on December 14, 1959 (R. 51). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission, entered in a proceeding had on referral from the Court of Claims, declaring certain rates of a common carrier by rail to have been unreasonably high as applied to past shipments, a judicially reviewable "order" within the meaning of 28 U.S.C. § 1336 and 49 U.S.C. § 17(9), when the legal consequence of the order is finally to relieve a shipper of its obligation to pay the carrier for past transportation services charges computed on the basis of those rates?

STATUTES INVOLVED

Sections 1336 and 1398 of the Judicial Code (28 U.S.C. §§ 1336, 1398), Section 17(9) of the Interstate Commerce Act (49 U.S.C. § 17(9)) and Sections 2(d) and 10(a), (e) of the Administrative Procedure Act (5 U.S.C. §§ 1001(d), 1009(a), (e)) are set forth in the Appendix to this brief.

STATEMENT

Petitioner is a common carrier by rail and is subject to the regulatory provisions of Part I of the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.* In 1941 and 1942 petitioner transported for the United States seventy-five interstate shipments of iron and steel articles. The shipments were intended for export through the port of New York but were not there exported due to war conditions. Two sets of rates then filed and effective were potentially applicable to the shipments in question: lower "export rates" and higher "domestic rates". The United States was billed, and made payment, on the basis of the domestic rates. Subsequently, purporting to act pursuant to § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U.S.C.

§ 66, the United States deducted from other freight charges due petitioner the difference between the export rate and the domestic rate as to each of the shipments, taking the position that the domestic rates were inapplicable to the shipments and that if applicable they were unreasonable insofar as they exceeded the export rates (R. 8-17).

Petitioner sued in the Court of Claims, 28 U.S.C. § 1491, seeking to recover this difference, which amounted to $7,237.87 (R. 3). After trial to a Commissioner and argument before the Court of Claims, that Court on April 3, 1957 held, citing *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, that the doctrine of primary jurisdiction required it to suspend the proceedings before it "pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments . . ." The Court's order further provided that proceedings should be instituted by the United States before the Commission within 60 days (R. 17-18).

In accordance with this order of suspension, the United States on May 28, 1957 filed in the Interstate Commerce Commission a petition which asserted that the United States was entitled to charges based upon the export rates from the various points of origin to New York and that charges based upon the domestic rates from the various points of origin to New York would be unreasonable to the extent that they exceeded the export rates from the same points to New York. ICC Docket No. 32187. The case was heard by an Examiner, who on May 5, 1958 issued a proposed report finding that the domestic rates were reasonable as to 12 of the 75 shipments involved but as to the remaining 63 were unreasonable insofar as they exceeded the ex-

port rates. Petitioner's exceptions to the proposed report were overruled by Division II of the Commission on November 12, 1958 (305 I.C.C. 259), and petitioner's petition for reconsideration by the entire Commission was denied on March 4, 1959 (R. 20-30).[1]

On March 23, 1959 the United States filed in the Court of Claims a motion to vacate the order of suspension and for judgment for petitioner in the amount of $1,663.39, the portion of the total recovery sought found by the Commission to have represented reasonable charges (R. 18). Petitioner opposed this motion, asking that the suspension of proceedings in the Court of Claims be continued until petitioner had had an opportunity to file and have determined, in the appropriate District Court, a complaint seeking to set aside and annul the order of the Interstate Commerce Commission (R. 30-31). On April 3, 1959, petitioner filed such a complaint in the District Court for the Eastern District of Pennsylvania, invoking the jurisdiction of that Court under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9)[2] (R. 38-42).

[1] Before the Commission the United States abandoned its position that the export rates were applicable and relied upon the contention that the domestic rates were unreasonable. 305 I.C.C. 259.

The Commission determined that the domestic rates would be unreasonable if applied to the 63 shipments on the ground that there was evidence that shipping space had been arranged for these shipments prior to their movement and that accordingly the shipper had shown due diligence in attempting to comply with the conditions attached to the export rates. The Commission did not hold that the domestic rates were unreasonably high in relation to the services involved.

[2] That complaint alleged that the Commission's order was invalid for the following reasons, among others: That there was no evidence of record that the rates found to be unreasonable were unjust and unreasonable in and of themselves with regard to the services rendered; that the Commission erred in finding that certain rates

The United States opposed petitioner's motion to continue the stay of the Court of Claims proceeding, urging that the order of the Interstate Commerce Commission upon which it relied in its motion for entry of judgment was not reviewable under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9) because it was not in fact an "order" but rather merely an "ancillary step" in a judicial proceeding, and that therefore there was no occasion further to delay the entry of judgment (R. 32-37).

On June 5, 1959, the Court of Claims, without further hearing and without purporting to review the order of the Commission or the administrative record on which it was based, issued an order granting the motion of the United States to vacate the order of suspension, and directing the entry of judgment for petitioner in the amount of $1,663.39 (R. 49-50).[3] The effect of the order was to deny petitioner recovery for the difference between $1,663.39 and $7,237.87, the amount which petitioner sought in the Court of Claims.

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were unreasonable insofar as the rates exceeded a level which was lower than the level which the Commission itself had previously prescribed for transportation of the same commodities from and to the same points; that the Commission's conclusion that certain of the rates were unjust and unreasonable was not predicated upon any evidence or finding that the rates were unjust and unreasonable in and of themselves with regard to the transportation service rendered but rather upon the erroneous assumption that the Commission possesses power to determine that a rate is unjust and unreasonable because of its belief as to the equities of the situation; and that the Commission failed to make findings of basic facts upon which to predicate its conclusions that the charges on certain of the shipments were unjust and unreasonable (R. 38-42).

[3] The time for the United States and the Interstate Commerce Commission to answer the complaint in the Eastern District of Pennsylvania has been extended by agreement of the parties until after this case is finally determined. Should the judgment of the Court of Claims be permitted to stand, the Pennsylvania case will be moot.

The order recited that petitioner's proposal that the proceedings be continued in suspension pending a District Court decision on its petition to set aside and annul the Commission's order contemplated a procedure which the court found "inapplicable here" and cited in support of this statement *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, and *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464.[4] The order further recited that it was made on the basis of the record, "including the determination by the Interstate Commerce Commission" (R. 49-50).

SUMMARY OF ARGUMENT

The order of the Interstate Commerce Commission is a final administrative determination of rights and obligations between the shipper and the carrier from which legal consequences follow. This Court has held that such an order is subject to judicial review. *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426. The fact that the order was made in a proceeding instituted before the Interstate Commerce Commission at the direction of a court does not make the order immune from judicial review. *El Dorado Oil Works* v. *United States*, 328 U.S. 12. That the Commission's order in this case is judicially reviewable is also suggested by the relevant provisions of the Administrative Procedure Act.

The order of the Commission should be reviewed in the manner provided for in Sections 1336 and 1398 of Title 28 of the United States Code. These statutes embody a determination by Congress as to the appro-

[4] Neither of these decisions would appear to be pertinent since neither involved the issue of the reviewability of a Commission order made on referral from a court.

priate method of review of Commission orders. This Court has held that Commission orders should be reviewed in the manner provided for by Congress even if they are entered in a proceeding had on referral from a court. *El Dorado Oil Works* v. *United States*, *supra*.

The only alternative to review pursuant to the provisions of these statutes would be review by the court in which the controversy originally arose. It is, however, established that the Court of Claims has no statutory authority to review an order of the Commission. The same situation would prevail where the original controversy arose in a state court. And even if the referral is made by an United States District Court review of the Commission's order as a part of the original controversy in that court would be inconsistent with the Congressional direction that review of Commission orders should take place in the special and separate proceedings provided for by statute.

ARGUMENT

I. The order of the Commission is subject to judicial review

In deference to the long established rule that the question of the reasonableness and legality of rates under the Interstate Commerce Act falls within the primary jurisdiction of the Interstate Commerce Commission, the Court of Claims directed that the status of the rates here in question should be initially determined in a proceeding brought before the Commission. *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 68.

The Commission's order determined the reasonableness and the legality under the Interstate Commerce Act of the rates in issue. The order is final and determinative of the rights of the parties under the Interstate Commerce Act save only as it may be enjoined, set aside, annulled or suspended by a court of competent authority acting in conformity with the standards of judicial review established by the decisions of this Court. The Government itself took the position in the Court of Claims that the Commission's action "for all practical purposes determines the outcome of the present suit".[5]

As a final administrative determination of rights and obligations between the shipper and the carrier from which legal consequences follow, the Commission's order is subject to judicial review. *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131, 132, 143; *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 18-19; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426; *Frozen Food Express* v. *United States*, 351 U.S. 40.

This Court has held that a final Commission order entered in a dispute between carrier and shipper over the reasonableness of past filed rates under the Interstate Commerce Act is subject to judicial review. *United States* v. *Interstate Commerce Commission*, *supra*. The Commission's order in this case, like that in *United States* v. *Interstate Commerce Commission*, is a final administrative determination in a controversy over the reasonableness of past rates.

Because the order does determine rights and obligations under the Interstate Commerce Act, because legal

[5] Defendant's Motion to Dismiss and Opposition to Plaintiff's Motion to Stay Proceedings (R. 33).

consequences follow from it, and because it is not a mere stage in an incomplete administrative adjudication, the question of its reviewability is not controlled by decisions relating to Commission "orders" found by this Court to have been only abstract declarations or otherwise not to be a final determination of rights and liabilities under the Interstate Commerce Act. Such decisions as *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299; *United States* v. *Griffin*, 303 U.S. 226; *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172; *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U.S. 522, and *Shannahan* v. *United States*, 303 U.S. 596, are therefore not in point.

The fact that the order was made in a separate proceeding which was instituted before the Interstate Commerce Commission pursuant to an order of the Court of Claims and was designed to serve as a premise for further action by that Court does not make the order immune from judicial review. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63-65; *Far East Conference* v. *United States*, 342 U.S. 570, 574-575; *El Dorado Oil Works* v. *United States*, 328 U.S. 12.

That the Commission's action in this case constitutes a reviewable order is also suggested by the provisions of the Administrative Procedure Act, 5 U.S.C. § 1001 *et seq.* Section 2(d) of that statute (5 U.S.C. § 1001 (d)) provides that the word "order" shall mean the whole or any part of the final disposition, whether affirmative, negative, injunctive or declaratory in form, of any agency in any matter other than rule making but including licensing. And Section 10 of the statute (5 U.S.C. § 1009) provides that any person suffering legal wrong because of any agency action, or adversely

affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. The decisions of this Court which establish that the Commission's order is reviewable are therefore confirmed by the provisions of this statute, which this Court has described as establishing a "general legislative pattern of administrative and judicial relationships". *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 433-434, n. 4. And see *United States* v. *Jones*, 336 U.S. 641, 672.

II. The Commission's Order Should Be Reviewed in the Manner Provided for in Sections 1336 and 1398 of Title 28 of the United States Code

Petitioner in this case sought judicial review of the Commission's order by bringing an action to set aside and annul the order in the United States District Court for the Eastern District of Pennsylvania, invoking the jurisdiction of that Court under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9). The former section provides that except as otherwise provided by Act of Congress "the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission". Venue was laid in the Eastern District of Pennsylvania in accordance with Section 1398 of Title 28, which provides that any civil action to enforce, suspend or set aside an order of the Interstate Commerce Commission "shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action".

The procedure followed by petitioner in seeking judicial review was appropriate and proper under the con-

trolling statutes and the decisions of this Court. Since the Commission's order is reviewable it follows that it should be reviewed in accordance with the statutory plan that Congress has provided for review of Commission orders.[6]

The decision of this Court in *El Dorado Oil Works v. United States*, 328 U.S. 12, is decisive on this question. In that case, as here, the issue involved concerned the legality of past charges of a carrier subject to the provisions of the Interstate Commerce Act. There, as here, the issue was first raised as a defense to a suit in a court for monetary recovery. There, as here, the court proceedings were suspended pending the institution and determination of a proceeding in the Interstate Commerce Commission. There, as here, the order of the Commission was declaratory in form and was

[6] The question whether an order made by the Interstate Commerce Commission in an independent proceeding instituted on referral from a court is reviewable under 28 U.S.C. § 1336 has arisen in at least six cases in the district courts. In two reported cases it has been held that such an order is reviewable under 28 U.S.C. § 1336. Davidson Transfer & Storage Co., Inc. v. United States, 164 F. Supp. 571 (D. Md. 1958); Eastern Freight-Ways, Inc. v. United States, 170 F. Supp. 848 (D. N.J. 1959). The same result was reached in an unreported case, Harris Foundry & Machine Co. v. United States, CA 394, M.D. Georgia, 1957. In two unreported cases the courts held or assumed that the order was not reviewable under 28 U.S.C. § 1336. See United States v. Interstate Commerce Commission, CA 1057-58, D. D.C., 1958, and United States v. Chesapeake & Ohio R. Co., CA 1477, E.D. Va., 1959. The issue has been raised but not decided in United States v. Interstate Commerce Commission, CA 649-58, D. D.C., 1958.

In at least four of these cases (Davidson, Eastern Freight-Ways and the two cases in the District of Columbia) the United States has taken the position that the Commission's order is reviewable under 28 U.S.C. § 1336. The Interstate Commerce Commission has consistently taken the position that the order is not so reviewable.

designed to serve as a premise for further action in the court in which the original suit was pending. This Court held that the order should be reviewed in an independent proceeding brought under the provisions of the statutes that govern review of orders of the Interstate Commerce Commission instead of being reviewed by the referring court.[7] See also *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 151, n. 11; *Far East Conference* v. *United States*, 342 U.S. 570, 577.

The only alternative to judicial review pursuant to the applicable provisions of the Judicial Code would be judicial review by the court in which the controversy originally arose. In the instant case, however, the Court of Claims has no statutory authority to review or to annul or suspend an order of the Commission. *United States* v. *Jones*, 336 U.S. 641, 651-653, 666-672. Its jurisdiction is confined to rendering a

[7] In El Dorado this Court held that it was proper for the order to be reviewed by a District Court of three judges convened pursuant to the statutory provisions now found in Sections 2321 and 2325 of Title 28. That case was decided before United States v. Interstate Commerce Commission, 337 U.S. 426, 441-443, in which this Court held for the first time that a Commission order which involved only the question of the payment of money did not raise questions of general importance and hence should be reviewed by a single-judge District Court. Furthermore, it is arguable that the order involved in the El Dorado case had a general significance that transcended the financial controversy between the parties.

Petitioner's suit in the Eastern District of Pennsylvania was brought before a single-judge District Court pursuant to the standards laid down in United States v. Interstate Commerce Commission, 337 U.S. 426, 441-443 ("The root of the controversy concerns the payment of money damages". *Id.* at p. 443). And see Davidson Transfer & Storage Co., Inc. v. United States, 164 F. Supp. 571 (D. Md. 1958) and Eastern Freight-Ways, Inc. v. United States, 170 F. Supp. 848 (D. N.J. 1959).

money judgment by way of relief against the United States. Thus, if the Court of Claims should determine that the Commission's order was vitiated by error of law or that the findings of fact on which the order rests are not supported by substantial evidence in the record as a whole, the Court of Claims would have no authority to remand the cause to the Commission for further proceedings. *Id.* at p. 671. And the Court of Claims, like any other court, has no authority to revise a Commission determination as to the reasonableness of rates. Although the Court of Claims wrote no opinion in this case its order shows on its face that the Court recognized the limitations on its own authority and did not even attempt to review the Commission's order.

There are, moreover, instances in which carriers or shippers may bring suits in state courts to enforce obligations imposed by tariffs or otherwise arising under the provisions of the Interstate Commerce Act. See, for example, *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134; *Great Northern Ry. & Co.* v. *Merchants Elevator Co.*, 259 U.S. 285; *Southern Pacific Co.* v. *Wheaton Brass Works*, 5 N.J. 594, 76 A.2d 890 (1950), *cert. den.* 341 U.S. 904 (1951); *Atlantic Coast Line R. Co.* v. *Wannamaker Chemical Co.*, 57 S.E.2d 311 (S.C. 1950); *Erie R. Co.* v. *Brainard*, 76 N.Y.S.2d 74 (App. T. 1947); *New York Central R. Co.* v. *City of Chicago*, 332 Ill. App. 583, 76 N.E.2d 2000 (1947); *Marony* v. *Applegate*, 226 App. Div. 412, 42 N.Y.S.2d 768 (1943).

If in such a case questions arise which fall within the primary jurisdiction of the Interstate Commerce Commission this Court has held that the proceedings should be stayed and the parties remanded to the Commission for a determination of the administrative as-

pects of the questions involved. *Thompson* v. *Texas Mexican R. Co., supra,* at p. 151. Compare *Marony* v. *Applegate, supra,* 226 App. Div. at p. 417, 42 N.Y.S. 2d at p. 775. In the event of such a referral the state court would have no authority to review or to set aside any order made by the Commission. *Thompson* v. *Texas Mexican R. Co., supra,* at p. 151, n. 11. See also *Venner* v. *Michigan Central R. Co.,* 271 U.S. 127; *North Dakota* v. *Chicago & Northwestern R. Co.,* 257 U.S. 485. Accordingly, unless that order were subject to judicial review under Sections 1336 and 1398 of 28 U.S.C. and Section 17(9) of 49 U.S.C., the losing party before the Commission would be subjected to an adverse court judgment without ever having had the opportunity to challenge in any court the administrative determination upon which that judgment rested.

Apart from the peculiar problems that arise in the case of a proceeding in the Court of Claims or in a state court, a general rule that any order entered by the Interstate Commerce Commission in a proceeding instituted pursuant to the direction of a District Court should be reviewed in the original proceeding in that court and not in a separate proceeding brought pursuant to the applicable provisions of the Judicial Code would lead to consequences that are not in harmony with the Congressional plan for review of Commission orders, even though the jurisdiction of the District Courts is not subject to the limitations imposed upon the Court of Claims and state courts. For example, a review by the District Court which made the referral to the Commission might well lead to results in direct conflict with the venue provisions of 28 U.S.C. § 1398, which require that an action to suspend or set

aside an order of the Commission shall be brought only in the judicial district wherein one of the parties bringing the action resides. Furthermore, if the order made by the Commission on referral should be of a kind that is required to be reviewed by a District Court of three judges, convened pursuant to the provisions of 28 U.S.C. §§ 2321 and 2325, review by a single-judge District Court would be inconsistent with these statutory provisions and with the Congressional policy which they embody.[8]

[8] A court case which raises issues with respect to the payment of money may on referral to the Commission lead to a Commission order which has aspects that go beyond the money obligation involved and which should therefore be reviewed by a three-judge District Court. Compare United States v. Interstate Commerce Commission, 337 U.S. 426, with United States v. Interstate Commerce Commission, 352 U.S. 158. Both cases involved the question whether certain railroads should pay the United States an allowance as shipper for certain wharfage and loading services at the port of Norfolk. In the first case the question arose with respect to wholly past transactions covered by a tariff that was no longer in existence. Accordingly this Court held that the Commission's order should be reviewed by a single-judge District Court. In the second case the question arose under a tariff that was still in effect so that the issue related not merely to payments for past transactions but also to the continuing and future obligations of the carriers. Accordingly it was reviewed by a three-judge District Court specially convened under the provisions of Sections 2321 and 2325 of Title 28 (United States v. Interstate Commerce Commission, 132 F. Supp. 34 (D. D.C. 1955)) whose decision was affirmed by this Court.

CONCLUSION

For the reasons stated the judgment of the Court of Claims should be reversed and the case remanded to that Court with directions to stay the proceeding pending a final determination in the case brought by petitioner in the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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APPENDIX

JUDICIAL CODE:

Section 1336, 28 U.S.C. § 1336:

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398, 28 U.S.C. § 1398:

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

INTERSTATE COMMERCE ACT:

Section 17(9), 49 U.S.C. § 17(9):

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

ADMINISTRATIVE PROCEDURE ACT:

Section 2(d), 5 U.S.C. § 1001(d):

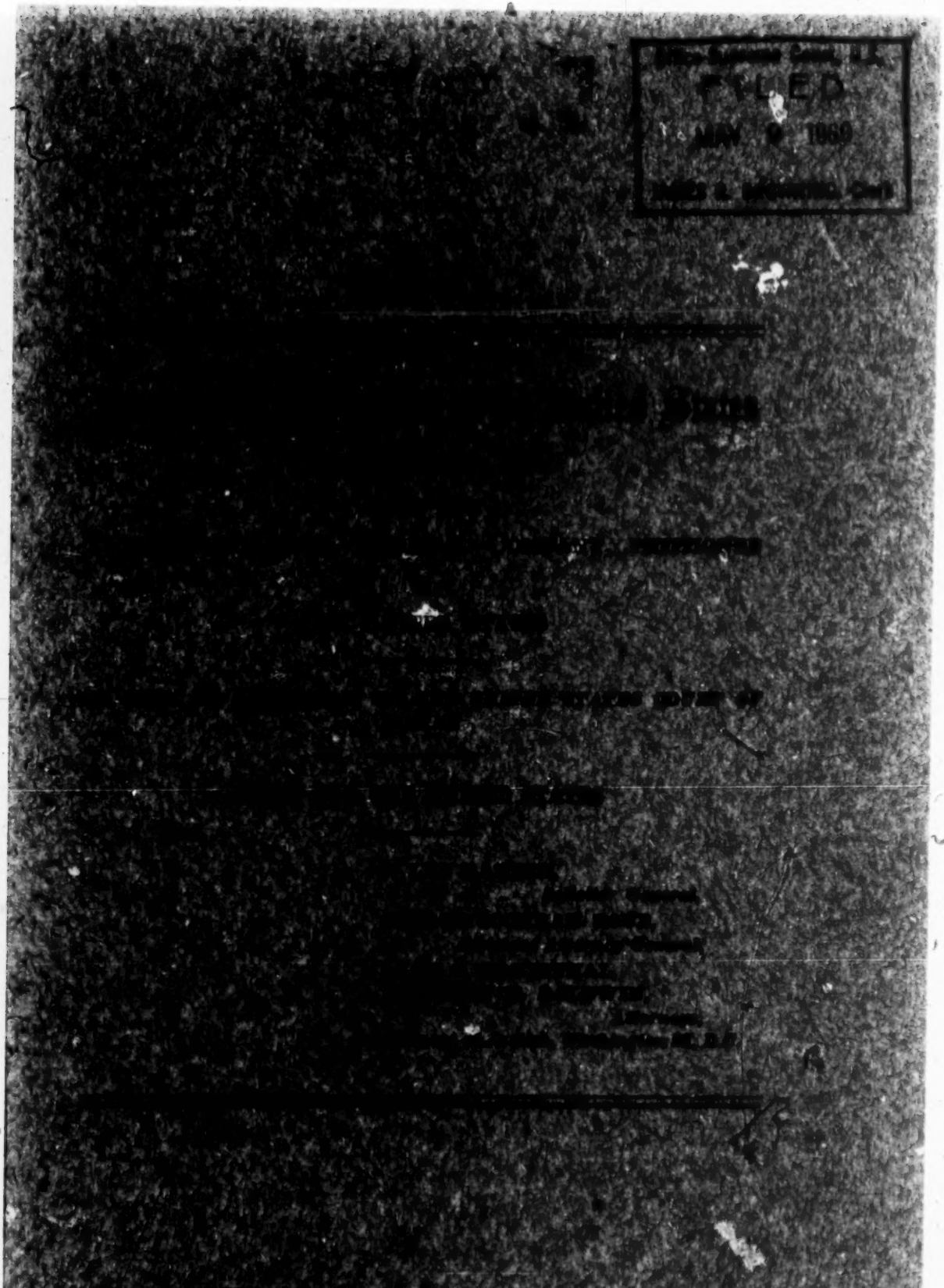
"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than

rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Sections 10(a), (c), 5 U.S.C. §§ 1009(a), (c):

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the Court of Claims. Its order entering judgment is unreported (R. 49–50).

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1959. On August 21, 1959, the time for the filing of a petition for a writ of certiorari was extended by Mr. Justice Stewart to October 3, 1959 (R. 50). The petition for a writ of certiorari was filed on October 2, 1959, and was granted on December 14, 1959 (R. 51). The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a determination made by the Interstate Commerce Commission on an issue of reasonableness of transportation charges, raised in litigation in the Court of Claims and referred to the Commission under the "primary jurisdiction" doctrine, is subject to review by a district court under the provisions of 28 U.S.C. 1336 and 49 U.S.C. 17(9).

STATUTES INVOLVED

The relevant provisions of the United States Code are as follows:

28 U.S.C. § 1336.

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 1398.

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

49 U.S.C. § 17(9).

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied,

or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

STATEMENT

During 1941 and 1942, petitioner transported certain shipments for the United States from specified inland points to the port of New York for exportation to Great Britain. Wartime conditions prevented the exportation of the shipments as intended. Thereafter, petitioner rendered bills for the transportation based upon the applicability of the rates published in the domestic tariff, rather than the lower rate specified in the export tariff. As required by Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, the bills were paid in full upon presentation. Upon post-payment audit, and as authorized by Section 322, the General Accounting Office deducted from other charges due petitioner the difference between the domestic and export rates, on the ground that, in the light of prior decisions of the Interstate Commerce Commission, the domestic rates claimed were unreasonable as applied to these shipments (R. 8–17).

Petitioner then brought suit in the Court of Claims to recover the amounts thus deducted (R. 1–3). On the authority of *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, the court referred to the Commis-

sion, under the primary jurisdiction doctrine, the question of the proper charges to be applied (R. 17–18). Pursuant to the court's order, the Government filed a petition with the Commission and, after investigation and hearing, the Commission determined that, with respect to the majority of the shipments, the domestic rates were unreasonable to the extent that they exceeded the export rates. The Commission made and filed a report containing its findings of fact and conclusions of law, and ordered that the proceedings before it be discontinued. On March 4, 1959, the Commission denied a petition for reconsideration filed by petitioner (R. 20–30).

On March 23, 1959, the United States moved the Court of Claims to vacate its order of suspension and to enter judgment for petitioner in the sum of $1,663.39, which constituted that portion of the recovery claimed by petitioner and found by the Commission to represent reasonable charges (R. 18). Petitioner opposed this motion and moved the Court of Claims to stay proceedings until the rendition of a final decision in an action which petitioner proposed to commence for the purpose of obtaining relief from the order of the Commission (R. 30–31). On April 3, 1959, petitioner filed a petition in the United States District Court for the Eastern District of Pennsylvania invoking that court's jurisdiction under 28 U.S.C. 1336 and 1398 and 49 U.S.C. 17(9) (R. 38–42). The United States opposed petitioner's motion for a stay in the Court of Claims (R. 32–37).

On June 5, 1959, the Court of Claims granted the Government's motion to vacate the suspension, and

entered judgment for petitioner in the sum of $1,663.39, "on the basis of the record made in this case, including the determination by the Interstate Commerce Commission" (R. 49–50).[1]

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission's determination as to the reasonableness of certain transportation charges, made on referral from the Court of Claims, is not an "abstract declaration" or a mere "stage in an incomplete process of administrative adjudication." Rather, the determination carries serious and direct "legal consequences" for the litigants; for under the doctrine of primary jurisdiction and administrative finality it was binding upon the Court of Claims. Thus, under this Court's decisions in *El Dorado Oil Works* v. *United States,* 328 U.S. 12, and *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, the Commission's determination was a reviewable "order" within the meaning of 28 U.S.C. 1336. Decisions of this Court holding Commission determinations non-reviewable under the Urgent Deficiencies Appropriations Act, from which Section 1336 is derived, are either distinguishable, or no longer controlling, since this Court's decision in the *Rochester Telephone Corp.* case. Unless Commission referral determinations are reviewable under 28 U.S.C. 1336, there can be no review of determinations

[1] Neither party requested review by the Court of Claims of the Commission's determination, and the court did not purport to review it.

made on referrals from the Court of Claims and state courts.

2. The Court of Claims does not have authority to review a determination of the Commission, whether or not the issue was referred by the Court of Claims to the Commission. Congress has not empowered that Court to review decisions of the Commission and the restrictions Congress has imposed upon the review of orders of the Commission, as well as the limited jurisdiction conferred by the Congress upon the Court of Claims, preclude an inference of such authority. *United States* v. *Jones,* 336 U.S. 641. Therefore, unless referral determinations are reviewable by the district courts under 28 U.S.C. 1336, they would not be reviewable by any court even if arbitrary and contrary to law.

3. In contrast to referrals by the Court of Claims, when a district court refers an issue as to the reasonableness of rates to the Commission, it would be preferable, to the extent consistent with the statutory plan, for the referring district court to review the Commission's determination. Congress appears to have explicitly authorized review proceedings in all federal district courts with venue (28 U.S.C. 1398). If the original district court must await review action by another district court, the resulting circuitous procedure, with its multiplicity of proceedings in the district courts, would not appear to accord with desirable judicial administration. Since venue relates solely to the convenience of litigants (*Neirbo Co.* v. *Bethlehem Corp.,* 308 U.S. 165) and venue may be waived by any party, including the Government (*Panhandle Co.* v. *Power Commission,* 324 U.S. 635, 639; *Peoria & P.U.R.*

Co. v. *United States*, 263 U.S. 528, 535–536), the venue provision of 28 U.S.C. 1398 might be deemed, in appropriate cases, to be waived by voluntary action of the parties in the course of the proceedings. However, where a waiver cannot properly be inferred, review must be had in the venue prescribed by 28 U.S.C. 1398.

4. Commission decisions pertaining to the reasonableness of charges sought to be recovered in Tucker Act suits are in substance orders "for the payment of money" which, under 28 U.S.C. 2321, are reviewable by a single judge, not by a three-judge, district court. Moreover, such orders are not of such widespread effect and public importance as to justify the expedited procedure of a three-judge court. A one-judge district court proceeding is in accord with this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426.

ARGUMENT

As shown by its memorandum filed in response to the petition for certiorari, the United States acquiesced in the granting of the petition for the reason that the reviewability of Interstate Commerce Commission determinations made upon referrals by courts under the primary jurisdiction doctrine has become of increasing public importance since this Court's decision in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59. Conflicting decisions of the lower courts in this area reflect confusion and uncertainty.

Apart from this case in the Court of Claims, the United States, as a litigant in courts making such referrals since the decision in the *Western Pacific* case, has consistently taken the position that ensuing

determinations by the Interstate Commerce Commission are "orders" within the meaning of 28 U.S.C. 1336 and 49 U.S.C. 17(9), and are, therefore, subject to independent review pursuant to those statutes. However, the Commission has expressed a contrary view, has intervened as of right [2] in a number of actions brought pursuant to 28 U.S.C. 1336 to obtain review of its determinations upon referral, and has asserted that the court lacked jurisdiction over the subject matter. *E.g., Davidson Transfer and Storage Co.* v. *United States,* 164 F. Supp. 571 (D. Md.); *United States* v. *United States, et al.,* Civil Action No. 1057–58 (D. D.C.), decided on October 5, 1959. The Commission's position has been that a referral determination is not an "order" within the meaning of Section 1336 because (1) it is merely ancillary to the pending court action; (2) it does not determine any right or obligation; and (3) it is solely an exercise of the Commission's function of investigation. In so arguing, the Commission has relied principally upon *United States* v. *Los Angeles & Salt R. Co.,* 273 U.S. 299, *United States* v. *Atlanta, B. & C.R. Co.,* 282 U.S. 522, *Shannahan* v. *United States,* 303 U.S. 596, and related cases. In the *Davidson* case, *supra,* the Commission's position was rejected. In *United States* v. *United States, supra,* however, the district court ac-

[2] 28 U.S.C. 2323 provides in part:

> The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

cepted the Commission's contentions and dismissed the action upon the ground that the referral determination was not an independently reviewable order. The opposition of the United States to petitioner's motion for a stay in the Court of Claims was based upon the same grounds and cases relied upon by the Commission (R. 34–37).

As shown hereafter, we think it clear that Congress did not intend that Commission action taken under the primary jurisdiction doctrine should be free from judicial scrutiny and the real issue is the appropriate forum for review of Commission determinations made pursuant to a reference. This question is one of such substantial importance to sound judicial administration that the Government believes that it may be of best assistance to the Court by submitting an objective discussion of the pertinent standards of judgment, since the Government's principal interest is its concern for the adoption of desirable review proceedings. An understanding of the procedural issue requires a consideration of factors broader than the context of the precise question involved in this particular case.

I

INTRODUCTION: THE PRACTICAL ADVANTAGES AND DISADVANTAGES OF THE ALTERNATIVE REVIEW PROCEEDINGS

In view of the factors this Court has considered in procedural matters, when not restricted by congressional limitations, the Court may be interested initially in a review of the comparative advantages and disadvantages of the alternative review procedures before detailed analysis of pre-existing statutory or judicially imposed restrictions.

Under the doctrine of primary jurisdiction as explained by this Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, it was made clear that in a suit between a rail carrier and private shippers, as well as the United States as a shipper, questions as to the construction or reasonableness of rates were within the exclusive primary jurisdiction of the Interstate Commerce Commission when enforcement of a claim required the resolution of issues, which, under the regulatory scheme, had been placed within the special competence of the administrative body, and in such a case the judicial process should be suspended pending referral of such issues to the Commission for its views (*id.* at 64). Since the decision in that case, proceedings have been suspended and referrals made to the Commission as to the reasonableness of rates in cases originating in the Court of Claims, the district courts, and state courts. A large proportion of cases by carriers against the United States under the Tucker Act have been brought in the Court of Claims. Suits by shippers against rail carriers for the recovery of transportation charges frequently are filed in the district courts or the state courts. When a question of reasonableness is raised, these courts may be required to stay the action so that a determination of the question may be made by the Commission. Since state courts have no authority to review administrative action taken by a federal agency under the dualism of the federal-state system, there can be no question but that review of Commission determinations is limited to that provided in the district courts under 28 U.S.C. 1336 and 1398

and 49 U.S.C. 17(9), and state courts may not enter judgment until any review proceedings in the federal system have terminated. *Thompson* v. *Texas-Mexican R. Co.*, 328 U.S. 134, 151. See also *infra*, pp. 14–20.

As the Commission has argued in the lower courts, a denial to a referring federal court, whether the Court of Claims or a district court, of the authority to review determinations of the Commission, in favor of another federal court, is fraught with certain practical disadvantages. The court in which the action is originally brought, with jurisdiction of the parties, would be required to continue holding the case in abeyance while an independent proceeding to review the Commission's determination is instituted and conducted in another federal court. Since it is the practice of the Commission, after making its determinations as to the reasonableness of rates, to enter an order discontinuing the proceeding without making an order for or against the payment of the sums involved, the reviewing court, if it is not the referral court, would enter no judgment of liability and, upon completion of the administrative process and later the review proceeding, the court of original instance would then, upon motion, enter judgment. It is obvious that this circuitous procedure may well result in a multiplicity of actions in different jurisdictions.

This circuitous procedure, with its splitting of litigation between several federal courts, may also be said in some measure to conflict with the apparent theory of a reference to the Commission by the court of original instance of a question of tariff reason-

ableness, as defined in *United States* v. *Western Pacific R. Co., supra.* There, the Court reiterated that issues of tariff construction and the reasonableness of a tariff as applied were "first" or "initially" matters (352 U.S. at 69, 70), for the Commission's determination:

> * * * [I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views [*id.* at 64].

The Court quoted from *Far East Conference* v. *United States,* 342 U.S. 570, 574:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by *preliminary resort* for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. [Emphasis added.]

The reasoning of the Court appeared to assume that the Commission's determination was in aid of the judicial process of the referring court and, after the Commission's initial determination, the referring court would be able to proceed. It is in this light that the Commission has assumed that in a reference case its determination constitutes an ancillary step in aid of the pending action and that, in making its special findings upon an issue involved in that suit by virtue of its special competence, it was not its function to pass upon the ultimate question of whether plaintiff or defendant should prevail in the pending court action.

On the other hand, there does appear to be a practical advantage in limiting the judicial forum for review to the district courts under 28 U.S.C. 1336 and 1398 and 49 U.S.C. 17(9). A proceeding to review Commission action under these statutes takes the form of a civil action in the district court against the United States (28 U.S.C. 2322) to enjoin or suspend the determinations made. The Commission has a right to intervene (28 U.S.C. 2323) and as a matter of practice the suit is ordinarily brought against the United States and the Commission. Although the position asserted on behalf of the United States may not be the same as the position asserted by the Commission, the court has the benefit of the views of the Commission. When determinations of the Commission are under attack, it may be a desirable procedure for the Commission to participate in their defense. If the determinations of the Commission were subject to review by the original court of referral, the Commission would not be a party[3] and, unless the Commission or the United States intervened in this litigation between shipper and carrier, the Government would not be heard (as it is always heard in review proceedings under the Urgent Deficiencies Act).

On balance, if this issue could be resolved exclusively in terms of the preferable judicial procedure, it would seem to be desirable for the referring court, whether the Court of Claims or a federal district court, to be

[3] Nor would the United States be a party if the shipper were private.

the court to effect the limited statutory review of Commission action under the Urgent Deficiencies Act [4] and also to determine the dispute between the parties in the same proceeding.

But the question cannot be resolved solely by a comparative weighing of the practical advantages and disadvantages of the alternative channels of review. Congress has spoken, and the choice is limited by the framework established by the statute.

II

WHEN THE COURT OF CLAIMS REFERS A RATE ISSUE TO THE COMMISSION, ITS DETERMINATION IS REVIEWABLE UNDER 28 U.S.C. 1336 BY A DISTRICT COURT

A. UNDER PRIOR DECISIONS OF THIS COURT, COMMISSION DETERMINATIONS UPON REFERENCE ARE REVIEWABLE ORDERS

In *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 128, the Federal Communications Commission classified the telephone company "as subject to all common carrier provisions of the Communications Act of 1934." In holding that this status determination was reviewable under the Urgent Deficiencies Appropriations Act,[5] the Court repudiated the "negative

[4] Under the doctrine of administrative finality, only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised upon review. If these legal tests are satisfied, the Commission's determination becomes incontestable. *Rochester Telephone Corp.* v. *United States* 307 U.S. 125, 140; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541.

[5] Pursuant to the provisions of Section 402(a) of the federal Communications Act of 1934, the Commission's orders were reviewable in the same manner as orders of the Interstate Commerce Commission.

order" doctrine. Instead, it decided that the critical consideration was that the Commission determination was "not a mere abstract declaration * * * nor was it a stage in an incomplete process of administrative adjudication" (*id.* at 143).

Subsequently, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, the Court directed the referral to the Interstate Commerce Commission of a question involving the legality of past practices pertaining to the payment of car allowances to a shipper. The Commission made a determination adverse to the shipper and ordered that the proceedings be discontinued. The shipper then brought an action before a three-judge district court in the Northern District of California[6] to set aside and annul the Commission's decision. Holding that the Commission "made no decision which required any party to the proceeding before it to do or not to do any specific act," and that "[h]ence there is no order, in the sense contemplated in the statute," the district court dismissed the action. *El Dorado Oil Works* v. *United States*, 59 F. Supp. 738, 739. On appeal, this Court decided both the jurisdictional question and the merits. *El Dorado Oil Works* v. *United States*, 328 U.S. 12. In disposing of the jurisdictional question, the Court said (*id.* at 18–19):

> * * * As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract

[6] Because of the venue provisions of 28 U.S.C. 1398, the independent review action was brought in the same judicial district as the original action.

> declaration." *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 143. "Legal consequences" (*id.* at 132) would follow which would finally fix a "right or obligation" (*id.* at 131) on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corp.* v. *United States, supra,* held to be reviewable by a district court of three judges. The District Court erred in dismissing the complaint for want of jurisdiction.

We see no basis for any cogent distinction between *El Dorado* and the present case.

On the other hand, the Commission action in such cases as *United States* v. *Los Angeles & Salt R. Co.,* 273 U.S. 299, was markedly different from that here involved. In the *Los Angeles* case the Commission, pursuant to a Congressional directive, had conducted an investigation into the value of the property of the railroad. Upon the conclusion of the investigation, it made a finding as to value. Dissatisfied with this finding, the railroad brought an action in the district court under the Urgent Deficiencies Appropriations Act to set it aside. This Court reversed the district court's holding (4 F. 2d 736) that it had jurisdiction to review the Commission finding, on the ground that the finding did not "command the carrier to do, or to refrain from doing, anything"; or "determine any right or obligation * * *. It was merely preparation for possible action in some proceeding which may be

instituted in the future * * *" (273 U.S. at 309–310).[7] Similarly, in *United States* v. *Atlanta, B. & C.R. Co.*, 282 U.S. 522, 527–528, the Court held that the district court did not have power to review a Commission finding which was made in the course of an investigation and which was not binding without further action by the Commission.

In *Shannahan* v. *United States*, 303 U.S. 596, the Commission, upon referral from the National Mediation Board pursuant to the Railway Labor Act, determined that a particular railway was not a "street, interurban, or suburban electric railway" within the meaning of Section 1 of that Act. In holding that the determination was not reviewable under the Urgent Deficiencies Appropriations Act, the Court noted that, as in the *Los Angeles* case, the determination was "merely preparation for possible action in some proceeding which may be instituted in the future" (*id.* at 599). It is true that the Court also pointed out that the administrative ruling was not in the form of an order and that "it is as clearly 'negative' as orders by which the Commission refuses to take requested action" (*ibid.*). But considerations of this kind appear to be no longer relevant in view of this Court's decision in *Rochester Telephone Corp.* (see *supra*, pp. 14–15).[8]

[7] It may also be noted that in the *Los Angeles* case the Court pointed out that the Commission was there acting neither in a quasi-judicial capacity to determine a controversy nor in a legislative capacity under its rate-making power (see 273 U.S. at 309). In the present case, the Commission was exercising a quasi-judicial function.

[8] See the discussion of the *Shannahan* and *Rochester* cases in Davis, *Administrative Law* (1951), pp. 654–655.

In other words, in the *Los Angeles, Atlanta,* and *Shannahan* cases, the Commission had taken no final action which in itself carried any adverse legal effects and, therefore, resort to the courts was premature.[9] This cannot be said of the Commission's determination here. True enough, that determination did not in form require petitioner to do any particular act. But, as in *El Dorado* (see 328 U.S. at 19), it terminated all administrative action and, of greater importance, its decision carried serious and direct legal consequences insofar as the litigants were concerned. Under the doctrines of primary jurisdiction and administrative finality, the Commission's determination is binding, unless reversed, and therefore fixes the rights and obligations of both the United States and petitioner with respect to the transportation charges for the shipments involved.

B. THE COURT OF CLAIMS DOES NOT HAVE AUTHORITY TO REVIEW A DETERMINATION OF THE COMMISSION, WHETHER OR NOT MADE UPON REFERENCE

We are unable to escape the conclusion that the congressional scheme may not be reconciled with authority in the Court of Claims to review determinations of the Interstate Commerce Commission. Congress has never empowered that court to pass upon determinations of the Commission interpreting tariffs or deciding their reasonableness, and the restrictions Congress has imposed upon the review of orders of the Commission, as well as the limited juris-

[9] See this Court's comments to this effect concerning this class of cases in *Rochester Telephone Corp* v. *United States*, *supra*, 307 U.S. at 130.

diction conferred by the Congress upon the Court of Claims, preclude such jurisdiction. Indeed, in a unanimous opinion in *United States* v. *Jones,* 336 U.S. 641, this Court expressed the same conclusion in explicit and unqualified language. There, the Court of Claims awarded a judgment in favor of a railroad for increased compensation for carrying the mail, notwithstanding the prior denial by the Commission of applications by the carrier for additional sums in excess of those paid under the rates fixed by the Commission. In reversing that decision, the Court said (*id.* at 651–652):

> Congress in no instance has expressly empowered the Court of Claims to review rate orders of the Commission, either to set them aside or to render a money judgment for additional amounts found due upon a determination of an order's invalidity. To infer such an intention would be contrary not only in spirit to the limitations Congress has placed upon review of such orders wherever expressly provided, but also to the whole history and practice of Congress in conferring jurisdiction on the Court of Claims.

The Court then pointed out that a review in the district court under 28 U.S.C. (1946 ed.) 41(6) of decisions of the Commission "arising under the postal laws" (*id.* at 671):

> possesses one outstanding advantage over review in the Court of Claims. It is that the district courts are not confined, as is the Court of Claims, to rendering a money judgment by way of relief against the United States. Under their general equity jurisdiction they would

> have power, on finding a rate order invalid, whether as confiscatory or as not complying with the statute, to remand the cause to the Commission for further proceedings. In this respect the review afforded and the relief given would more nearly approximate that given by the Urgent Deficiencies Act in similar cases reviewable under its terms.

The reasoning of the Court seems as applicable to a case which has been referred by the Court of Claims to the Commission as in the situation where there has been no reference. We deal here with the question of the jurisdiction of the Court of Claims as prescribed by the Congress and it would appear to be impossible to reconcile those statutory limitations with any assumption of the review power. Congress could not have intended that the Court of Claims should not have jurisdiction to review decisions of the Commission in an initial action but, when the Court of Claims referred an issue to the Commission, its determination became reviewable by that court.

It follows, in our view, that petitioner is correct in asserting that the court below was without power to review the Commission's ruling in this case. Therefore, unless the Commission's decision is reviewable by a federal district court acting under 28 U.S.C. 1336, 1398, and 49 U.S.C. 17(9), it would not be reviewable by any court, even though entered arbitrarily, without substantial supporting evidence, and in defiance of law. Such a notion of sweeping administrative finality is not reconcilable with the general legislative pattern of administrative and judicial relationships (Administrative Procedure Act, Sections 2(d), 10, 5 U.S.C. 1001(d),

1009; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 433–434) or the clear congressional intent to provide for review of Commission orders.

III

WHEN A DISTRICT COURT REFERS AN ISSUE TO THE COMMISSION, ITS DETERMINATION WITH RESPECT TO RATES MAY BE REVIEWABLE BY THE REFERRING DISTRICT COURT IN THOSE CASES IN WHICH VENUE IN ANOTHER DISTRICT MAY APPROPRIATELY BE HELD TO HAVE BEEN WAIVED. IN OTHER CASES, REVIEW MUST BE HAD IN THE DISTRICT COURT WITH VENUE UNDER 28 U.S.C. 1398

So that the Court may have a better understanding of the review procedure under the Urgent Deficiencies Appropriations Act insofar as it relates to referrals by the Court of Claims to the Interstate Commerce Commission, we deem it advisable as background to discuss briefly the situation in which the referring court is a district court. In such a situation, a suit is brought in a district court with jurisdiction of the parties, by a shipper against a railroad, or by a railroad against a shipper, for transportation charges, and, upon motion or upon the initiative of the court, a rate issue is referred to the Commission and the proceedings are stayed pending its determination. After that determination, may a party seek review in the district court of original jurisdiction or must a suit be brought only in the judicial district of the residence or principal office of the party or parties bringing the action under 28 U.S.C. 1398 and 49 U.S.C. 17(9) (*supra*, pp. 2–3)? In this situation, it would be preferable (for the

reasons set forth in Point I, *supra*) to channel the review proceedings under the Urgent Deficiencies Act into the referring court—to the extent that that is permissible under the statutory plan. We suggest that this can be accomplished in some measure by application of the concept of waiver to the venue provisions of 28 U.S.C. 1398.

Congress appears to have explicitly authorized review proceedings in all federal district courts and the venue provision of the statute must be deemed solely for the benefit of the party instituting the review action. Venue relates to the convenience of litigants. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165. It may be waived by any party, including the Government. *Panhandle Co.* v. *Power Commission*, 324 U.S. 635, 639; *Peoria & P.U.R. Co.* v. *United States*, 263 U.S. 528, 535–536. The undesirability of a circuitous review procedure, with its multiplicity of proceedings, could perhaps lead to judicial rules of construction in which a party shall be deemed to have agreed to waive the venue requirements of 28 U.S.C. 1398 and to have consented that the referring court shall be the proper reviewing tribunal under the Urgent Deficiencies Act.

However, where waiver of the venue provisions of Section 1398 cannot appropriately be inferred in favor of the referring court—and these may be the majority of the instances—review must be had in the district court with the venue prescribed by that section.

IV

THE COMMISSION DETERMINATION IS REVIEWABLE BY A SINGLE-JUDGE, NOT A THREE-JUDGE, DISTRICT COURT

In bringing its suit to review the Commission's order in the District Court for the Eastern District of Pennsylvania, petitioner did not request the convening of a three-judge court (R. 38–42; petitioner's brief, p. 12, fn. 7). In similar cases, the Government has taken the position that a one-judge, rather than a three-judge, court is proper [10] because Commission orders pertaining to the reasonableness of past charges sought to be recovered in Tucker Act suits are in substance orders "for the payment of money" which are not reviewable by a three-judge court.[11] In addition, these orders are not of such widespread effect

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[10] See *Davidson Transfer & Storage Co.* v. *United States*, *supra*; *Eastern Freight-Ways, Inc.* v. *United States*, 170 F. Supp. 848 (D. N.J.). And in seeking review of a Commission order made on referral of a rate question from a Tucker Act suit in the District Court for the District of Minnesota, the Government brought its suit (*United States* v. *United States, et al.*, Civil Action No. 1057–58) before a one-judge court in the District of Columbia.

[11] 28 U.S.C. 2321 provides:

> The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission *other than for the payment of money* or the collection of fines, penalties and forfeitures, shall be as provided in this chapter. [Emphasis added.]

Later in 28 U.S.C., Chapter 157, it is provided in Section 2325 that an injunction restraining the enforcement of an I.C.C. order shall not be granted except by a three-judge court.

and public importance as to justify the expedited procedure of a three-judge reviewing court. Thus, the one-judge proceeding is in accord with the principles enunciated by this Court in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 441–443.[12]

CONCLUSION

1. The Court of Claims does not have the statutory authority to review determinations of the Interstate Commerce Commission, whether the issue of reasonableness of rates is referred to the Commission by the Court of Claims or not, and review is limited to that provided in 28 U.S.C. 1336 and 1398 and 49 U.S.C. 17(9) by a one-judge, rather than a three-judge, district court.

2. Implicit in the decision of the Court of Claims entering judgment for petitioner in favor of the Government, in reliance upon the decision of the Commission, was the assumption that that decision was final and was not reviewable by any court, even though entered arbitrarily. It is apparent that such a notion of sweeping administrative finality is not reconcilable with either the general legislative pattern of administrative and judicial relationships or the clear congressional intent to provide for review of Com-

[12] It is true that in the *El Dorado* case, this Court stated (328 U.S. at 19) that the Commission referral determination there involved was reviewable by a three-judge district court. The point was not discussed, however, and, in any event, *El Dorado* was decided prior to *United States* v. *Interstate Commerce Commission, supra.* The latter decision casts considerable doubt regarding the present vitality of this aspect of *El Dorado.* See 337 U.S. at 442.

mission orders. Accordingly, the judgment below should be reversed and the cause remanded, with instructions to suspend the proceedings in the Court of Claims pending the outcome of petitioner's action in the Eastern District of Pennsylvania.

Respectfully submitted.

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